

# **Charging Ahead: Has the Government Purchase Card Exceeded its Limit?**

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## I. INTRODUCTION<sup>1</sup>

The Federal Government implemented broad-based and tumultuous acquisition reform throughout the 1990s. Rapid changes affected almost every aspect of federal procurement law, policy, and practice. As agencies and procurement professionals continue implementation of the various changes imposed upon the procurement system by both the Congress and the President, a *cumulative* assessment of the reform era remains premature. Many acquisition reform initiatives still lack traction.

However, at least one reform, responsible for dramatically altering the Government's purchasing behavior, merits prompt attention and examination. Surprisingly, this reform is unrelated to the Government's largest or most complex purchases of supplies, services, or construction. Rather, this government-wide behavioral sea change derives from a common-sense solution to an age-old problem: simplifying the acquisition process for Government's high volume of small-dollar buying.<sup>2</sup>

Throughout the last decade, primarily at the behest of Vice President Gore's National Performance Review (NPR), the Government embraced a concerted effort to reform

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<sup>1</sup> This thesis represents a significant expansion of an article co-written with Professor Steven L. Schooner, *Purchase Cards and Micro-Purchases: Sacrificing Traditional United States Procurement Policies At the Altar of Efficiency*, 9 PUB. PROC. L. REV. 148 (2000).

<sup>2</sup> Richard S. Slater, An Analysis of Credit Card Use as a Method for Making Small Purchases in the United States Marine Corps 12-13 (1994) (Master's thesis, Naval Postgraduate School) (on file at the Defense Technical Information Center, Accession Number ADA297054 <<http://stinet.dtic.mil>>); cf. WILLIAM H. GREGORY, THE DEFENSE PROCUREMENT MESS 16 (1989) ("the whole acquisition process is so cumbersome that it becomes less likely that it will ever function effectively in its present form ... [that it] is now so fundamentally flawed that it may (continued ...) )

small-dollar purchasing by integrating the familiar plastic charge card into the procurement process.<sup>3</sup> While this effort may seem too elementary to be declared revolutionary, the government charge card, now better known as the government purchase card,<sup>4</sup> has proven to be one of the most significant and far reaching acquisition reform initiatives of the 1990s.

These convenient plastic cards, the ubiquitous tool of consumers around the globe, have revolutionized the way the U.S. Government buys and pays for the vast majority of its purchases.<sup>5</sup> Possibly, because the Government embraced the use of

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be beyond repair"); *id.* ("the paper-laden defense industry is on the verge of pricing itself out of the market").

<sup>3</sup> Gen. Acct. Off., *Management Reform Implementation of the National Performance Review's Recommendations*, Rept. No. GAO/OGC-95-1, at 461-62 (1994).

<sup>4</sup> The government purchase card is not a debit or a credit card, but is a payment card. Government funds must be available and approved for obligation before purchases are made. There is no line of credit and no revolving interest payments. VISA Purchase Card website (visited July 17, 2000) <<http://www-s2.visa.com/pd/govt/purchase.html>>. "A Governmentwide commercial purchase card charge authorizes the third party (e.g., financial institution) that issued the purchase card to make immediate payment to the contractor. The Government reimburses the third party at a later date for the third party's payment to the contractor." Federal Acquisition Regulation (FAR) 32.1108. The FAR is the primary set of regulations governing all aspects of Federal Government procurement. The FAR applies to all federal agencies and is published in Chapter 1 of Title 48 of the Code of Federal Regulations. Agency supplements to the FAR are published in Chapters 2-63 of Title 48 of the Code of Federal Regulations. In this article, citations to the FAR and agency FAR supplements will omit reference to the CFR and will identify the specific section in the FAR or agency FAR supplement. The FAR can be accessed online at the Government's Acquisition Reform website (visited July 17, 2000) <<http://www.arnet.gov/far>>.

<sup>5</sup> In Fiscal Year (FY) 99, the Government executed 20,631,398 purchase card acquisitions compared to 10,470,158 non-purchase card acquisitions. GSA FEDERAL  
(continued ... )

charge cards long after the public at large, the Government's use of this new procurement vehicle has quickly skyrocketed. Observers expect the trend to continue, especially in light of formal Government policy: "The future is in the cards."<sup>6</sup>

This thesis examines the U.S. Government's experience with the government purchase card— a rapidly evolving government purchase vehicle that, to many, represents a model of convenience, efficiency, and commercial practice. The genesis of the purchase card program dates back to the early 1980s.<sup>7</sup> The program received a big push in the early 1990s with Vice President Gore's NPR and with the Federal Acquisition Streamlining Act (FASA) of 1994.<sup>8</sup> FASA established a new class of acquisitions— micro-purchases— that were tailor-made to facilitate use of the

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PROCUREMENT DATA CENTER, FY 99 FEDERAL PROCUREMENT REPORT 2, 13 (2000).

<sup>6</sup> Federal Card Services Task Force, Electronic Processes Initiatives Committee, *Federal Smart Card Implementation Plan: "The Future is in the Cards"* (1998) (visited July 17, 2000) <<http://policyworks.gov/org/main/me/epic/scards.html>>.

<sup>7</sup> Slater, *supra* note 2, at 12.

<sup>8</sup> Pub. L. No. 103-355, 108 Stat. 3243 (1994); Gen. Acct. Off., *Acquisition Reform Purchase Card Use Cuts Procurement Costs, Improves Efficiency*, Rept. No. GAO/NSIAD-96-138, at 1 (1996); Gen. Acct. Off., *Management Reform GAO Comments on the National Performance Review's Recommendations*, Rept. No. GAO/OGC-94-1, at 1-7, 230-31 (1993).

emerging government purchase card.<sup>9</sup> Soon thereafter, the government purchase card program experienced explosive growth that continues today.<sup>10</sup>

The current purchase card program—SmartPay<sup>11</sup>—leverages several benefits and efficiencies for the Government: reduced paperwork, prompt receipt of purchased supplies and services, reduced administrative costs, increased transaction speed, improved management information, more efficient invoicing, income from rebates, higher customer satisfaction, and a reduction in the number of invoices and inquiries regarding government payments.<sup>12</sup> While these advantages are well chronicled throughout the Government, some of the less desirable effects and policy implications of the program have been overlooked by Government policymakers and agencies in their rush to praise the purchase card program. For example, the purchase card program compromises, in the name of administrative efficiency, several fundamental government procurement laws, regulations, and policies.<sup>13</sup> Accordingly, at this point, prudence and the public trust mandate an empirical examination of the purchase program and its impact on government purchasing practices to measure the

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<sup>9</sup> Gen. Acct. Off., *Acquisition Reform: Regulatory Implementation of the Federal Acquisition Streamlining Act of 1994*, Rept. No. GAO/NSIAD-96-139, at 58 (1996).

<sup>10</sup> Gen. Acct. Off., *Acquisition Reform: Purchase Card Use Cuts Procurement Costs, Improves Efficiency*, Rept. No. GAO/NSIAD-96-138, at 2 (1996); GSA FEDERAL PROCUREMENT DATA CENTER, FY 99 FEDERAL PROCUREMENT REPORT 13 (2000).

<sup>11</sup> See discussion *infra* Part III.

<sup>12</sup> Gen. Acct. Off., *Management Reform: Implementation of the National Performance Review's Recommendations*, Rept. No. GAO/OGC-95-1, at 461 (1994).

<sup>13</sup> See discussion *infra* Part VI.C.

vehicle's performance against important government procurement policies and goals, not solely against the standard of administrative efficiency and customer satisfaction. The public trust demands such a review to ensure that taxpayer funds are neither misused nor wasted on false economies. At the same time, Congress should consider the installation of brakes or controls that, if needed, could provide appropriate protection for fundamental principles underlying our procurement system: transparency, competition, and integrity.<sup>14</sup>

## II. BACKGROUND: FROM A SMALL SEED TO A GREAT FOREST

Despite widespread consumer use of charge cards in the private sector, the Government was slow to adopt the plastic card for the procurement function.<sup>15</sup> Even though the Government used charge cards as early as 1983,<sup>16</sup> it was not until 1986 that several agencies sponsored government charge card acquisition test

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<sup>14</sup> Steven L. Schooner, *Pondering the Decline of Federal Government Contract Litigation in the United States*, 8 PUB. PROC. L. REV. 242, 248 (1999).

<sup>15</sup> The purchase card procurement reform initiative was intended to "reduce administrative costs and other burdens which the procurement function imposes on the Federal Government and the private sector." Exec. Order No. 12,352, Federal Procurement Reforms, 47 Fed. Reg. 12,125 (1982).

<sup>16</sup> The Government began using charge cards for official travel as early as 1983. U.S. Government Travel Charge Account (visited July 17, 2000) <<http://pub.fss.gsa.gov/fm/current/fm1a.html>>; 1998 GSA Annual Report 41. For more than fifteen years, hordes of government employees have benefited from the convenience of American Express and Diners Club cards for use associated with their official travel. See *id.*

programs aimed at reducing administrative procurement costs in the procurement function.<sup>17</sup>

#### A. 1982 Executive Order & GSA Travel Charge Card Program

President Reagan's Executive Order 12,352<sup>18</sup> directed federal agencies to establish new procurement programs aimed at cutting red tape. It directed agencies to create programs to "reduce administrative costs" taking into account "the need to eliminate unnecessary agency procurement regulations, paperwork, reporting requirements, solicitation provisions, contract clauses, certifications, and other administrative procedures."<sup>19</sup> This broad mandate was interpreted by government agencies to authorize use of a charge card by the Government.<sup>20</sup>

The General Services Agency (GSA), the U.S. Government's closest analogy to a central purchasing agency, was the first agency to create a charge card program. In 1983, GSA established a travel charge card program.<sup>21</sup> Under this groundbreaking

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<sup>17</sup> Neal P. McMahon, *The Impact on the Purchase Card Program of Increasing the Micro-Purchase Threshold and Simplified Acquisition Threshold Within the Federal Acquisition Streamlining Act of 1994* 13 (1995) (Master's thesis, Naval Postgraduate School) (on file at the National Technical Information Service <<http://www.ntis.gov>>), NTIS Order Number AD-A305 975/5INZ); Gen. Acct. Off., *Acquisition Reform Purchase Card Use Cuts Procurement Costs, Improves Efficiency*, Rept. No. GAO/NSIAD-96-138, at 2 (1996).

<sup>18</sup> Federal Procurement Reforms, 47 Fed. Reg. 12,125 (1982).

<sup>19</sup> *Id.*

<sup>20</sup> Gen. Acct. Off., *Acquisition Reform Purchase Card Use Cuts Procurement Costs, Improves Efficiency*, Rept. No. GAO/NSIAD-96-138, at 2 (1996); Slater, *supra* note 2, at 14.

<sup>21</sup> U.S. Government Travel Charge Account Services Contract (visited July 17, 2000) <<http://pub.fss.gsa.gov/fm/current/fm1a.html>>, 1998 GSA Annual Report 41.

program, contractor-provided charge cards were issued to federal employees to facilitate travel planning and official travel by federal employees.<sup>22</sup> The program provided for both individually billed accounts<sup>23</sup> and centrally billed accounts.<sup>24</sup> Under the terms of the 1982 Executive Order, the program's goals were to (1) improve government cash management procedures by reducing the need for cash advances for official travel, (2) reduce administrative costs associated with official travel, (3) provide rebates to the government based on charge card usage, and (4) improve overall management of travel funds.<sup>25</sup>

#### **B. Department of Commerce Charge Card Test Program**

In 1986, at the behest of the Office of Federal Procurement Policy (a statutory office within the Office of Management and Budget), the Department of Commerce sponsored a pilot government purchase card program at the National Atmospheric

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<sup>22</sup> *Id.*

<sup>23</sup> Under individually-billed accounts, federal employees sign agreements with the charge card contractor that the card will only be used for official travel and that the bills are due upon receipt. Employees then pay the charges with travel reimbursements received from the federal agency. U.S. Government Travel Charge Account Services Contract (visited June 12, 2000)  
[<http://pub.fss.gsa.gov/fm/current/fm1a.html>](http://pub.fss.gsa.gov/fm/current/fm1a.html)

<sup>24</sup> Under centrally-billed accounts, the agency is responsible for all charges and directly pays the charge card contractor. U.S. Government Travel Charge Account Services Contract (visited June 12, 2000)  
[<http://pub.fss.gsa.gov/fm/current/fm1a.html>](http://pub.fss.gsa.gov/fm/current/fm1a.html).

<sup>25</sup> U.S. Government Travel Charge Account Services Contract (visited June 12, 2000)  
[<http://pub.fss.gsa.gov/fm/current/fm1a.html>](http://pub.fss.gsa.gov/fm/current/fm1a.html).

and Oceanic Administration.<sup>26</sup> Rocky Mountain Bankcard Systems, Inc. (Rocky Mountain), a subsidiary of Colorado National Bank, won a sealed bid competition for a contract to provide MasterCard services to the Government.<sup>27</sup>

The purchase card essentially is a commercial charge card issued to federal employees through a government contract with a charge card vendor (typically a bank or financial institution). Each card, uniquely numbered, is used by an authorized government purchaser to acquire or pay for government purchases of official use supplies and services.<sup>28</sup> This convenient purchasing mechanism eliminates much of the bureaucracy historically associated with government procurement.<sup>29</sup> By authorizing government employees to make charges within pre-set charge limits, the purchase card enables agencies to expedite acquisitions, avoid burdensome procurement practices, streamline payment procedures, and reduce administrative

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<sup>26</sup> Henry L. Schnepf, Effects of Credit Card Purchasing at Installation Level 11-12 (1994) (Master's Thesis, Naval Postgraduate School) (on file at the National Technical Information Service <<http://www.ntis.gov>>, NTIS Order Number AD-A284 968/5INZ.); McMahon, *supra* note 17, at 13; Slater, *supra* note 2, at 14.

<sup>27</sup> Slater, *supra* note 2, at 14; Schnepf, *supra* note 26, at 12.

<sup>28</sup> As discussed more fully below, the authority to purchase with the purchase card differs from the typical contracting officer authority. See generally FAR Subpart 1.6—Career Development, Contracting Authority, and Responsibilities.

<sup>29</sup> GSA Office of Intergovernmental Solutions, *Use of Charge Cards in Federal Government—A Great Success Story* (visited July 17, 2000) <<http://policyworks.gov/org/main/mg/intergov/PC-Frontpg.htm>>.

costs associated with higher volume, lower dollar value government procurements.<sup>30</sup>

Not surprisingly, the Department of Commerce purchase card test program validated charge cards as a viable method to streamlining small purchases. Accordingly, in 1987, GSA began developing a government-wide purchase card program.

### C. Government-Wide Charge Card Program

Following the success of the test program at the Department of Commerce, the Office of Federal Procurement Policy directed GSA to develop a government-wide charge card program for acquisitions of supplies and services.<sup>31</sup> In 1989, GSA fielded the new government-wide charge card program as single schedule award, again to Rocky Mountain.<sup>32</sup> The government title for this program— International Merchant Purchase Authorization Card— was commonly referred to by its catchy acronym: IMPAC.<sup>33</sup> In the first year of the IMPAC program, over \$9 million was charged by 12,000 government employee cardholders representing 246 offices in 30 agencies.<sup>34</sup> The average value of the purchases was \$300.<sup>35</sup>

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<sup>30</sup> GSA Office of Intergovernmental Solutions, *Use of Charge Cards in Federal Government— A Great Success Story* (visited July 17, 2000)  
<<http://policyworks.gov/org/main/mg/intergov/PG-Frontpg.htm>>.

<sup>31</sup> Slater, *supra* note 2, at 14-15.

<sup>32</sup> Schnepf, *supra* note 26, at 11

<sup>33</sup> McMahon, *supra* note 17, at 13.

<sup>34</sup> *Id.* at 14.

<sup>35</sup> *Id.*

The goals of the IMPAC program were similar to the GSA's goals for the travel charge card program:

- improve government cash management processes,
- reduce administrative costs for small dollar acquisitions, and
- streamline payment procedures.<sup>36</sup>

Under the IMPAC program, Rocky Mountain provided charge card services to all federal agencies desiring to participate in the program.<sup>37</sup> The range of services offered essentially mirrored the basic charge card services offered under the Department of Commerce test program— charge cards, management reports, and program support to government agencies.<sup>38</sup> One exception was that the IMPAC program switched to VISA as opposed to the MasterCard used under the Department of Commerce test program.<sup>39</sup> The contract period was one year, with four option years.<sup>40</sup>

The IMPAC contract was recompeted in 1993.<sup>41</sup> Rocky Mountain again won the contract for one year with four option years.<sup>42</sup> This contract contained several

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<sup>36</sup> Slater, *supra* note 2, at 15.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; McMahon, *supra* note 17, at 14.

<sup>39</sup> Slater, *supra* note 2, at 14-15.

<sup>40</sup> *Id.* at 15.

<sup>41</sup> McMahon, *supra* note 17, at 14.

<sup>42</sup> Slater, *supra* note 2, at 15.

enhancements for the Government: elimination of the administrative fee that the agencies paid under the earlier charge card contracts, improved management reports and procedures, and online remote access to account information.<sup>43</sup> More significantly, Rocky Mountain offered rebates to agencies for prompt payment of monthly account statements.<sup>44</sup>

#### **D. National Performance Review and the Purchase Card Council**

Purchase card use gained momentum when, in 1993, NPR (Vice President Gore's initiative to re-invent Government into a more efficient and less costly endeavor)<sup>45</sup> recommended increased use of the purchase card for small purchases.<sup>46</sup> Specifically, the NPR recommended that the Government:

LOWER COSTS AND REDUCE BUREAUCRACY IN SMALL PURCHASES THROUGH THE USE OF PURCHASE CARDS:  
Provide managers with the ability to authorize employees to purchase small dollar value items directly using a government purchase card.  
Require internal government supply sources to accept this card.<sup>47</sup>

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<sup>43</sup> *Id.* at 16.

<sup>44</sup> Slater, *supra* note 2, at 16.

<sup>45</sup> This program's name subsequently changed to the National Partnership for Reinventing Government. Extensive information on this effort can be found at the NPR website (visited July 17, 2000) <<http://www.npr.gov>>.

<sup>46</sup> Gen. Acct. Off., *Aquisition Reform Purchase Card Use Cuts Procurement Costs, Improves Efficiency*, Rept. No. GAO/NSIAD-96-138, at 1 (1996).

<sup>47</sup> AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS, THE REPORT OF THE NATIONAL PERFORMANCE REVIEW, App. C (1993) (recommendation PROC09) (visited July 17, 2000) <<http://www.npr.gov/library/npr rpt/annrpt/redtpe93>>. In early 1997, the NPR touted the charge card as its first example of "common sense procurement policies." BILL CLINTON & AL GORE, THE BLAIR HOUSE PAPERS 36-37 (1997).

NPR strongly urged government agencies to use the purchase card to streamline acquisition of supplies and services.<sup>48</sup> The General Accounting Office (GAO) endorsed the NPR purchase card proposal, stating that the purchase card program “offers several benefits, such as reduced paperwork, prompt receipt of items, and a reduction in the number of invoices and inquiries about payments.”<sup>49</sup>

In an effort to speed implementation of the NPR purchase card recommendation, the Department of the Treasury procurement executive formed a Purchase Card Council comprised of procurement executives from Departments of Treasury, Commerce, Transportation, Health and Human Services, Interior, and State.<sup>50</sup> The Council’s purpose was expeditious implementation of the NPR recommendation “to expand the use of the Government purchase card for buying small dollar items to achieve a more responsive, efficient and streamlined mechanism for small purchasing.”<sup>51</sup> Participants pledged to:

- (1) Significantly expand use of purchase cards over levels existing in January 1993, with a target increase of at least 100 percent by October 1, 1994, for those agencies that have not yet made maximum effective use of the card.
- (2) Significantly increase the number of purchase cardholders over levels existing in January 1993, with a target increase in users of at least 100

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<sup>48</sup> McMahon, *supra* note 17, at 16.

<sup>49</sup> Gen. Acct. Off., *Management Reform Implementation of the National Performance Review's Recommendations*, Rept. No. GAO/OGC-95-1, at 461 (1994); Gen. Acct. Off., *Management Reform Comments on the National Performance Review's Recommendations*, Rept. No. GAO/OGC-94-1, at 231 (1993).

<sup>50</sup> Purchase Card Council Report 1 (1994) (visited June 14, 2000) <[http://purchasecard.sarda.army.mil/GPC\\_Sep94.pdf](http://purchasecard.sarda.army.mil/GPC_Sep94.pdf)>.

<sup>51</sup> Purchase Card Council Report, *supra* note 50, at 3.

percent by October 1994, for those agencies that have not made maximum appropriate distribution of the card.

- (3) Place the purchase card into the hands of appropriately trained line managers and other non-procurement personnel for the accomplishment of transactions under \$2,500.
- (4) Identify and eliminate internal impediments to the maximum beneficial use of the purchase card and actively promote and support legislation to eliminate statutory impediments.
- (5) Cooperate with each other and the Office of Federal Procurement Policy to share experiences relevant to the expanded use of the purchase card.<sup>52</sup>

Thereafter, GSA, the Department of Energy, and the Federal Emergency

Management Agency joined the council and also signed the pledge.<sup>53</sup>

The Council achieved the first goal three months ahead of schedule.<sup>54</sup> By July 1994, purchase card sales had surged by 119 percent.<sup>55</sup> The Council issued a report in September 1994 detailing its successes and challenges regarding the remaining goals.<sup>56</sup> The Council reported the following additional accomplishments:

- Overcame administrative and regulatory barriers to card use,
- shared “best practices” in implementation and training,
- promoted card use at conferences, and
- publicized the benefits of the card.<sup>57</sup>

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<sup>52</sup> *Id.* at App. A.

<sup>53</sup> *Id.* at 3-4.

<sup>54</sup> *Id.* at 4.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 4-22.

<sup>57</sup> *Id.* at 1-2.

The Purchase Card Council was instrumental in implementing the NPR purchase card recommendations. It not only demonstrated the feasibility of widespread use of the card, it set a high standard for implementation of the purchase card across all government agencies. It was upon this record of accomplishment that Congress acted in making legislative reforms aimed at aggressive implementation of the purchase card throughout the federal government.

#### **E. Federal Acquisition Streamlining Act—Micro-Purchase Authority Fuels Charge Card Activity**

The floodgates opened in 1994 with the enactment of the FASA,<sup>58</sup> which breathed life into many of the NPR's procurement-related recommendations. FASA created a new class of acquisitions valued less than \$2,500, called micro-purchases.<sup>59</sup> FASA exempted micro-purchases from many of the burdensome procurement regulations and requirements. For example, micro-purchases are exempt from small business requirements, domestic preference provisions, and competition requirements.<sup>60</sup>

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<sup>58</sup> Pub. L. No. 103-355, 108 Stat. 3243 (1994). This groundbreaking statute revised more than 200 procurement rules and introduced new innovative acquisition methods. Gen. Acct. Off., *Aquisition Reform Regulatory Implementation of the Federal Acquisition Streamlining Act of 1994*, Rept. No. GAO/NSIAD-96-139, at 1, 58 (1996). Among other things, FASA raised the small purchase limit to \$100,000, and changed the name “small purchases” to “simplified acquisition.” Pub. L. No. 103-355, §§ 4001, 4201, et seq.; FAR Subpart 13.3—Simplified Acquisition Methods.

<sup>59</sup> FASA, Pub. L. No. 103-355, § 4301, 41 U.S.C. § 428(f); FAR 2.101. The micro-purchase limit for construction is \$2,000. *Id.*

<sup>60</sup> FASA, Pub. L. No. 103-355, § 4301, 41 U.S.C. § 428; GSA Office of Intergovernmental Solutions, *Use of Charge Cards in Federal Government—A Great Success* (continued ...)

In practice, however, the most significant FASA reform is the authority to delegate micro-purchase authority to non-procurement personnel using the purchase card.<sup>61</sup> Shortly thereafter, President Clinton infused greater momentum by directing federal agencies to expand use of the purchase card through program offices.<sup>62</sup> Accordingly, by December 1994, the Federal Acquisition Regulation (FAR) was amended to reflect this new purchasing regime which entailed: (1) a \$2,500 micro-purchase threshold, below which many burdensome procurement laws and regulations did not apply and (2) a statutory preference for use of the quick and convenient purchase card to buy below that threshold.<sup>63</sup>

#### **F. No Turning Back: Purchase Card Use Skyrockets**

In 1989, the first year in which the Government enjoyed wide availability of the purchase card through the IMPAC program, 246 different offices interspersed throughout thirty government agencies issued more than 10,000 of these handy

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(... continued from previous page)  
Story (visited July 17, 2000) <<http://policyworks.gov/org/main/mg/intergov/PCFrontpg.htm>>.

<sup>61</sup> FASA, Pub. L. No. 103-355, § 4301, 41 U.S.C. § 428(c)

<sup>62</sup> Exec. Order 12,931, Federal Procurement Reform, 59 Fed. Reg. 52,387 (1994).

<sup>63</sup> Federal Acquisition Circular (FAC) 90-24, 59 Fed. Reg. 64,786 (1994); FAR 13.201(b). Federal Acquisition Circulars (FACs) are the formal amendments to the FAR System and can be accessed online at the Government's Acquisition Reform website (visited July 17, 2000) <<http://www.arnet.gov/far/index.htm>>.

plastic procurement vehicles.<sup>64</sup> A decade later, in 1999, over 517,000 federal employees in more than sixty government organizations hold cards.<sup>65</sup>

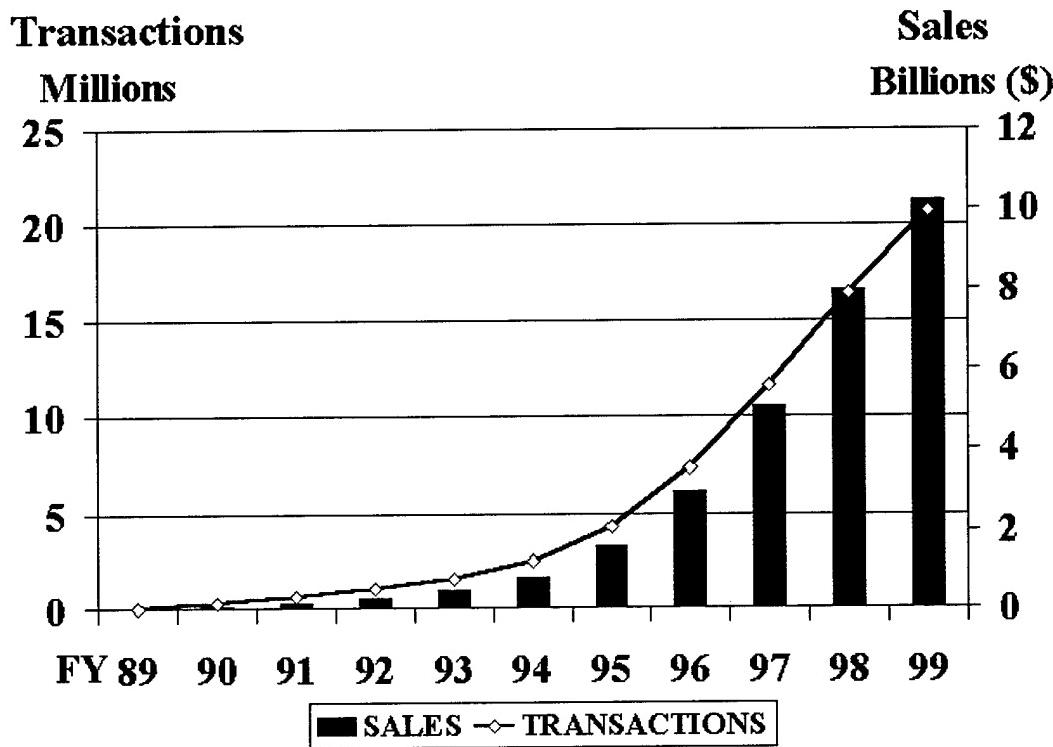
Consistent with the Government's current aggressive goal—that agencies utilize the purchase card for at least ninety percent of micro-purchases<sup>66</sup>—purchase card usage continues to skyrocket. Three indicia reflect the breadth of this growth: (a) the number of purchase card transactions, (b) the number of dollars spent by charge card holders, and (c) the percentage of the Government's total procurement budget spent through charge cards. As Figure 1 indicates, each year government buyers use their purchase cards more frequently and, in the process, spend more money through purchase card transactions. Moreover, as discussed below, each year witnesses a greater percentage of the Government's total procurement budget spent through purchase card transactions.

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<sup>64</sup> GSA SmartPay website, *Purchase Fiscal Year Growth* (visited July 3, 2000) <<http://www.fss.gsa.gov/services/gsa-smartpay/purchasefygrowth.doc>>.

<sup>65</sup> *Id.*

<sup>66</sup> Electronic Processes Initiatives Committee, *Electronic Commerce for Buyers and Sellers: A Strategic Plan for Electronic Federal Purchasing and Payment* 10, 29 (1998) (visited July 17, 2000) <<http://policyworks.gov/org/main/me/epic/ecplan.pdf>>. The National Defense Authorization Act for Fiscal Year 1998 requires the Department of Defense to use the purchase card for at least 90 percent of all micro-purchases by October 1, 2000. Pub. L. No. 105-85, § 848(a)(2), 10 U.S.C. § 2304 note.



**Figure 1**  
**Government-wide Purchase Card Usage: 1989 - Present**  
**Transaction Volume and Dollars Spent<sup>67</sup>**

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<sup>67</sup> GSA SmartPay website, *Purchase Fiscal Year Growth* (visited July 3, 2000) <<http://www.fss.gsa.gov/services/gsa-smartpay/purchasefygrowth.doc>>. The raw data are as follows:

FY	Sales (\$)	Transactions	Cardholders
89	460,612.00	2,326	10,489
90	56,312,535.00	270,983	18,926
91	140,735,006.00	639,389	30,336
92	275,573,665.00	1,058,890	44,532
93	472,103,391.00	1,512,275	74,591
94	808,473,245.00	2,471,308	82,804
95	1,591,773,703.10	4,248,496	130,353
96	2,914,368,604.20	7,327,878	209,295
97	5,045,264,293.79	11,593,616	264,505
98	7,960,818,859.76	16,447,721	340,078
99	10,186,089,274.00	20,631,198	517,015

*Id.*

The Government expects continued significant increases in charge card usage. GSA projects Government to spend \$18 billion in purchase card transaction in FY 2000.<sup>68</sup> As the volume of purchase card usage has grown, these purchase card buys have come to account for a significant portion of the Government's procurement budget.

In FY 99, the Government spent \$199 billion in 10.5 million contracting actions (excluding purchase card transactions).<sup>69</sup> At \$10 billion, purchase card transactions accounted for five percent of the total dollars spent in federal procurement. Considering GSA's projections for future purchase card usage, this acquisition reform initiative is poised to account for ten percent of the federal contracting budget within several years.

While some may dismiss the \$10 billion purchase card slice of the federal procurement budget as insignificant when compared to the \$199 billion annual procurement budget, analogies to other categories of procurement prove illuminating. In FY 99, the entire Federal Government spent only \$15 billion on construction (e.g.,

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<sup>68</sup> David Temoshok, *SmartPay: The Next Generation in Federal Payment Card Services*, slide 3 (1999) (visited July 17, 2000) <[http://ec.fed.gov/tallahassee2\\_22/index.htm](http://ec.fed.gov/tallahassee2_22/index.htm)>

<sup>69</sup> GSA FEDERAL PROCUREMENT DATA CENTER, FY 99 FEDERAL PROCUREMENT REPORT 2, 13 (2000). While GSA's annual Federal Procurement Report provides purchase card statistics (albeit limited in scope, *see discussion infra* Part VI.C.1), purchase card transactions are not included in any other part of the annual comprehensive procurement report. *Id.* at 13.

office buildings, military barracks, runways, court houses, prisons, etc.).<sup>70</sup> At the same time, no civilian (e.g., non-defense) agency spent more than \$15.6 billion in FY 99; only two civilian agencies spent more than \$10 billion.<sup>71</sup>

Shifting the focus from aggregate usage, the individual agency statistics in Table 1 reflect the breadth of purchase card use. Some leading card users include:

Agency or Department	Total Value of Purchase Card Transactions	Number of Purchase Card Transactions	Number of Cardholders	Average Purchase Value Per Transaction	Average Value of Purchases Per Cardholder
Veterans Affairs	\$2,592,508,080	2,536,411	42,347	\$1,022	\$61,221
Army	\$1,755,318,079	3,637,792	107,017	\$483	\$16,402
Navy	\$1,357,743,496	2,469,571	39,062	\$550	\$34,759
Air Force	\$1,083,685,761	2,480,197	73,945	\$437	\$14,655
Agriculture	\$447,162,105	1,978,912	23,370	\$226	\$19,134
Interior	\$404,990,811	1,932,593	93,573	\$210	\$4,328
Postal Service	\$362,727,179	1,039,829	18,069	\$349	\$20,075
Justice	\$344,791,541	701,375	13,966	\$492	\$24,688
Transportation	\$283,272,601	738,097	27,069	\$384	\$10,465
Health & Human Services	\$244,288,789	519,332	6,459	\$470	\$37,821
Energy	\$183,343,743	365,294	7,566	\$502	\$24,233
Treasury	\$162,882,472	517,763	18,090	\$315	\$9,004
GSA	\$153,488,797	244,144	3,682	\$629	\$41,686
Commerce	\$118,063,034	308,330	7,732	\$383	\$15,269

Table 1— Selected Agency Card Usage, Highest Volume Users (FY 99)<sup>72</sup>

<sup>70</sup> GSA FEDERAL PROCUREMENT DATA CENTER, FY 99 FEDERAL PROCUREMENT REPORT 10 (2000).

<sup>71</sup> The Department of Energy spent \$15.6 billion and the National Aeronautics and Space Administration (NASA) spent \$10.9 billion. GSA FEDERAL PROCUREMENT DATA CENTER, FY 99 FEDERAL PROCUREMENT REPORT 5 (2000).

<sup>72</sup> GSA FEDERAL PROCUREMENT DATA CENTER, FY 99 FEDERAL PROCUREMENT REPORT 13 (2000).

As Table 1 indicates, in FY 99, seven government agencies— Veterans Affairs, Army, Navy, Air Force, Agriculture, Interior, and Postal Service— each processed more than a million card transactions; the Army alone processed over 3.6 million transactions. Four other agencies— Justice, Transportation, Health & Human Services, and Treasury— each used the purchase card for more than 500,000 transactions during FY 99.

FASA, as originally enacted, contained an annual micro-purchase limit of \$20,000 for non-procurement personnel.<sup>73</sup> In FY 99, seven agencies exceeded this limit with the *average* value of their purchase card transactions. The highest was the Department of Veterans Affairs, where each cardholder's purchase card transactions total, on average, \$61,221. Congress repealed the \$20,000 limit in 1996.<sup>74</sup>

The statistics suggest that many of the purchase card transactions involve volume purchases of items larger than observers might expect. Amongst the four

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<sup>73</sup> FASA, Pub. L. No. 103-355, § 4301.

<sup>74</sup> Clinger-Cohen Act of 1996, § 4304(b)(4), Pub. L. No. 104-106, 110 Stat. 642, 664 (1996); 41 U.S.C. § 428 note. Originally passed as Divisions D and E, National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 642-703 (1996), the name of the Clinger-Cohen Act of 1996 flows from the Federal Financial Management Improvement Act of 1996, Pub. L. No. 104-208, § 808, 104 Stat. 3009 (1996), which itself was included as part of the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 104 Stat. 3009 (1996). Division D of the National Defense Authorization Act for Fiscal Year 1996 originally was called the Federal Acquisition Reform Act of 1996, while Division E's original name was the Information Technology Management Reform Act of 1996. Congress renamed both as the Clinger-Cohen Act of 1996 in honor of retiring lawmakers who played key roles in the passage of the two acts, former Representative William Clinger of Pennsylvania and former Senator (now Secretary of Defense) William Cohen of Maine. Douglas P. DeMoss, *Procurement During the Civil War and Its Legacy for the Modern Commander*, 1997 Army Law. 9 n.2.

highest volume user agencies, the average amount each agency spent per transaction fluctuates between \$437 and \$1,022. Combining the more than \$6.8 billion spent by these four agencies, and dividing by their more than 11.1 million transactions, yields an average purchase of approximately \$610. These numbers suggest that numerous smaller purchase card transactions, such as a box of standard government-issue pens (\$2.79),<sup>75</sup> a wall clock (\$16.71),<sup>76</sup> a waterproof cloth briefcase (\$28.45),<sup>77</sup> or a box of copy paper (\$53.00),<sup>78</sup> must be offset by larger buys, such as a conference table

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<sup>75</sup> Price as advertised on the Javits-Wagner-O'Day (JWOD) online catalog (visited July 17, 2000) <<http://www.jwod.com>> (NSN 7520-01-386-1604). A box contains a dozen Skilcraft recycled retractable ball point pens (black ink, medium point); pen cap is made from 100 percent post-consumer plastic and barrel made from 50 percent post-consumer plastic.

<sup>76</sup> Price as advertised on the Javits-Wagner-O'Day (JWOD) online catalog (visited July 17, 2000) <<http://www.jwod.com>> (NSN 6645-01-456-5006). These clocks, which can be customized with an organization's seal or logo, have a 20 centimeter diameter, a 12-hour face, a black case, and a white dial.

<sup>77</sup> Price as advertised on the Javits-Wagner-O'Day (JWOD) online catalog (visited July 17, 2000) <<http://www.jwod.com>> (NSN 8460-01-352-3064). Navy blue briefcase, with internal calculator and pencil pocket, large outside pocket with Velcro closure, optional nylon shoulder strap, measures 12 inches by 16 inches by 3 inches. The nylon carrying handles offer 6,000 pound break strength.

<sup>78</sup> Price as advertised on the Javits-Wagner-O'Day (JWOD) online catalog (visited July 17, 2000) <<http://www.jwod.com>> (NSN 7530-01-364-9488). 10 reams per box; one ream contains 500 sheets; 8½" x 11"; 83 brightness; contains 30 percent recycled materials and 30 percent post consumer materials, meets the EPA's comprehensive procurement guidelines for green buying (see discussion *infra* Part IV.C.7).

(\$683.33),<sup>79</sup> an office workstation suite (\$2,025.00),<sup>80</sup> or, in all likelihood, personal computers (\$2,499).<sup>81</sup>

Following a decade of sustained accelerated growth in purchase card usage, a slowdown in the *growth* of purchase card use finally emerged in FY 99 as the Government moved toward its goal of making at least ninety percent of micro-purchases with the purchase card.<sup>82</sup> Nevertheless, growth of the program continues to be steep—FY 99 saw a twenty-five percent increase in the number of transactions and a twenty-eight percent increase in the dollar volume.<sup>83</sup> Certainly, purchase card usage will eventually stabilize. Many agencies, however, favor continued efforts to *increase* opportunities for purchase card use. The Department of Defense (DoD), the

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<sup>79</sup> Price as advertised on the Javits-Wagner-O'Day (JWOD) online catalog (visited July 17, 2000) <<http://www.jwod.com>> (NSN 7110-00-902-3052). Unitized-style table with walnut-finished veneer surface with rectangular, laminated plastic top; seats 12 comfortably; dimensions are 120"W x 48"D x 29.5"H.

<sup>80</sup> Price as advertised on the UNICOR (Federal Prison Industries, Inc.) online catalog (visited July 17, 2000) <<http://www.unicor.gov>> (product number S0120U04WN). U-Shape Workstation, Right Hand Return, available in a variety of stains.

<sup>81</sup> Price as advertised on the Staples online catalog (visited July 17, 2000) <<http://www.staples.com>> (item number 428875). Hewlett-Packard Pavilion 9690C with Intel® Pentium® III processor 800MHz, Ultra DMA Hard drive, frontside bus of 133MHz, and 128MB SDRAM Memory (expandable to 768MB), HP CD-Writer Plus (4x/2x/20x: 4x max. speed write, 2x max. speed re-write, 20x max. speed read), front-access serial port, a 1.5Mbps Digital Lucent WildWire™ DSL modem and 10/100BaseT network card. Monitor not included.

<sup>82</sup> GSA SmartPay website, *Purchase Fiscal Year Growth* (visited July 17, 2000) <<http://www.fss.gsa.gov/services/gsa-smartpay/purchasefygrowth.doc>>.

<sup>83</sup> *Id.*

largest purchase card user, recently promulgated a rule *requiring* use of the government purchase card for all micro-purchases, with certain limited exceptions.<sup>84</sup>

DoD also recently approved the purchase card for *overseas* acquisitions of up to \$25,000.<sup>85</sup> In 1998, DoD sponsored an initiative to increase domestic micro-purchase authority to \$10,000.<sup>86</sup> While this effort failed to gain traction in Congress, the issue of expanded micro-purchase authority—whether at \$5,000, \$10,000, or \$25,000—is likely to reappear. GSA recently issued a final rule *requiring* federal supply service contractors to accept the government purchase card for procurements valued under the micro-purchase threshold.<sup>87</sup> Obviously, given the symbiotic relationship

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<sup>84</sup> 65 Fed. Reg. 46,625, 46,626 (2000); DFARS 213.270; *see also* 64 Fed. Reg. 38, 878, 38,879-80 (1999), proposed Department of Defense Federal Acquisition Regulation Supplement (DFARS) 213.270, requiring use of the government purchase card for all micro-purchases with limited exceptions); Memorandum from David Oliver, Principal Deputy Under Secretary of Defense for Acquisition and Technology, to Secretaries of the Military Departments et al. (Dec. 10, 1998) (requiring use of the purchase card for all acquisitions under \$2,500 (with limited exceptions) to minimize processing of invoices valued below \$2,500) (visited July 17, 2000) <<http://www.safaq.hq.af.mil/contracting/toolkit/part13/micropurchase.pdf>> (attachment to Brig. Gen. Anderson's Dec. 10, 1998 memorandum).

<sup>85</sup> DFARS 213.301; 64 Fed. Reg. 56,704 (1999). Interestingly, DoD allows use the card to make purchases valued up to \$25,000 from vendors in the United States as long as the purchase is made outside of the United States for use outside of the United States. DoD Purchase Card Program Management Office, *Policy/Procedures* (visited June 29, 2000) <<http://purchasecard.sarda.army.mil/2aPolicy.htm>>

<sup>86</sup> *Small Business: DoD's Hope of Raising Micropurchase Ceiling to \$10,000 Appears Doomed in Congress*, 69 Fed. Cont. Rep. 611 (BNA) (June 1, 1998); H.R. 3616 (Enrolled in House), National Defense Authorization Act for Fiscal Year 1999 (passed in the House), 105th Cong. (1998) (directing study on increasing micro-purchase threshold to \$10,000—not included in final version).

<sup>87</sup> 65 Fed. Reg. 11,246, 11,248 (2000) (to be codified at 48 C.F.R § 552.232-77).

between purchase card usage and the micro-purchase threshold, raising the latter would synergistically fuel the former. As a result, it remains premature to conclude when or where purchase card use will level off.

### III. GSA SMARTPAY CONTRACT

The new GSA purchase card program— SmartPay— became operational in November 1998.<sup>88</sup> SmartPay is administered by GSA’s Federal Supply Service and offers an enhanced menu of card-related services as compared to the IMPAC program.<sup>89</sup> SmartPay is a government-wide multiple award indefinite delivery/indefinite quantity task order contract<sup>90</sup> that includes not only government purchase card requirements, but also government travel and fleet card requirements.<sup>91</sup>

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<sup>88</sup> GSA SmartPay website (visited June 12, 2000)  
<<http://www.fss.gsa.gov/services/gsa-smartpay>>.

<sup>89</sup> Office of Federal Procurement Policy, *From Paper to Electronics, An Assessment of Current Electronic Commerce Activity in Procurement* (1998) (visited July 17, 2000)  
<<http://policyworks.gov/org/main/me/epic/assessment.html>>.

<sup>90</sup> An indefinite quantity contract is “[a] contract providing for an indefinite quantity, within stated maximum or minimum limits, of specific supplies or services to be furnished during a fixed period, with deliveries to be scheduled by placing orders with the contractor” and “should be used only when a recurring need is anticipated.” RALPH C. NASH JR., STEVEN L. SCHOONER & KAREN R. O’BRIEN, GOVERNMENT CONTRACTS REFERENCE BOOK 296 (1998). “Funds for other than the stated minimum quantity are obligated by each task or delivery order, not by the contract itself.” *Id.*

<sup>91</sup> GSA SmartPay Contract 2 (visited June 12, 2000)  
<<http://www.fss.gsa.gov/services/gsa-smartpay/fm/doc/tcmaster.doc>>. Previously, travel and fleet services were each covered by contracts separate from the purchase card contract. Office of Federal Procurement Policy, *From Paper to Electronics, An Assessment of Current Electronic Commerce Activity in Procurement* (1998) (visited July 17, 2000)  
<<http://policyworks.gov/org/main/me/epic/assessment.html>>. The Fleet Services  
(continued ... )

## A. Overview of the Contract

The SmartPay program allows government agencies greater flexibility to enhance and broaden the purchase card's functions and the charge card program services provided by the vendor.<sup>92</sup> Agencies may select from five different card and financial services vendors: US Bank (formerly Rocky Mountain), Bank of America (formerly Nations Bank), Bank One (formerly First Chicago), Citibank, and Mellon Bank.<sup>93</sup> All vendors offer fleet, travel, and purchase card services and integrated FTP

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Card is used to purchase fuel, repair and maintenance, and other fleet services for the over 150,000 vehicles in the GSA Interagency Fleet Management System and over 200,000 vehicles on the fleets of seventy-five other federal agencies. GSA's description of the U.S. Government Fleet Services Card is available at <<http://pub.fss.gsa.gov/fm/current/fm1c.html>>. The Travel Services Card is a contractor-provided charge card issued to government employees for use on official government travel. Agencies may establish individually-billed accounts as well as centrally-billed accounts. The purpose of the travel card is to improve government cash management procedures by reducing employee reliance on cash advances for official travel obtained from agency finance offices. Like the purchase card, agencies receive rebates based on charge account usage (\$40 million for Fiscal Year 1994-96). GSA's description of the U.S. Government Travel Charge Account Services Contract is available at <<http://pub.fss.gsa.gov/fm/current/fm1a.html>>.

<sup>92</sup> GSA SmartPay website (visited July 17, 2000)  
<<http://www.fss.gsa.gov/services/gsa-smartpay>>.

<sup>93</sup> SmartPay Contract, *supra* note 91, at 2. For December 1998 – September 1999, the breakdown of government business, by contractor, was: Citibank— 41 percent; Bank of America— 31 percent; United States Bank— 25%; Bank One— 3%; and Mellon Bank— 1%. GSA Federal Supply Service Briefing, Managing Your Card Program, Slide 4 (visited July 23, 2000) <<http://www.fss.gsa.gov/services/gsa-smartpay/expo2web.ppt>>.

services, except for Mellon Bank, which provides only purchase card services under the contract.<sup>94</sup> Both VISA and Mastercard are available under the contract.<sup>95</sup>

## B. Agency Choice

To meet their specific mission requirements, individual federal agencies place customized task orders with one of the award vendors.<sup>96</sup> Agencies may combine core charge card services with value-added features tailored to meet varied agency requirements.<sup>97</sup> Examples of the value-added features available under the SmartPay contract include:

- convenience checks,<sup>98</sup>
- debit cards,<sup>99</sup>
- automated teller machine services,<sup>100</sup>

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<sup>94</sup> *Id.*

<sup>95</sup> GSA SmartPay Program Overview 4 (1998) <<http://www.fss.gsa.gov/services/gsa-smartpay/smtpay.pdf>>.

<sup>96</sup> Task Order Guide For GSA's Fleet, Travel And Purchase Cards (1998) (visited July 17, 2000) <<http://www.fss.gsa.gov/services/gsa-smartpay/fm/guide2.cfm>>.

<sup>97</sup> *Id.*

<sup>98</sup> SmartPay Contract, *supra* note 91, at 211. Convenience checks are defined under the contract as follows: "Contractor-provided product and service which allow checks to be written on a card/account within established dollar limits." *Id.* at 133.

<sup>99</sup> *Id.* at 180. Debit cards are defined under the contract as follows: "Contractor-provided product and service that debits an account/fund within established dollar limits. May be on-line or off-line. When the debit card is presented for authorized payment, funds are debited directly from an established financial account/fund." *Id.* at 134.

<sup>100</sup> *Id.* at 180. Automated teller machine (ATM) services are defined under the contract as follows: "Contractor provided ATM services which allow cash

(continued ... )

- stored-value cards/E-purse products,<sup>101</sup>
- hybrid cards with smart card technology,<sup>102</sup>
- enhanced financial reporting,<sup>103</sup>
- inter/intra-governmental financial systems integration,<sup>104</sup> and
- electronic bill payment.<sup>105</sup>

In the task order, agencies can also set customized dollar thresholds, vendor training requirements, and additional use restrictions.<sup>106</sup>

### C. Goals

The SmartPay contract's consolidated approach to charge card services is designed to achieve these stated objectives:

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withdrawals within established dollar limits from participating ATM's to be charged to a contractor-issued card/account." *Id.* at 133.

<sup>101</sup> *Id.* at 179. Stored valued cards (also called E-Purse) are defined under the contract as follows: "A product and service that contains an established block of dollars that are stored on the card or network. These can be off-line accountable systems or on-line systems. They may be rechargeable or disposable." *Id.* at 135.

<sup>102</sup> *Id.* at 183. A hybrid card is "[a] plastic card that has both magnetic stripe and integrated chip capabilities." *Id.* at 184. Hybrid cards are required to have four basic functional capabilities: 1) information storage, 2) data management, 3) card and user authentication, and 4) encryption and digital signature features. *Id.* at 185-86.

<sup>103</sup> *Id.* at 182-83.

<sup>104</sup> *Id.* at 180.

<sup>105</sup> *Id.* at 183.

<sup>106</sup> *Id.* at 179-91; see also GSA Office of Intergovernmental Solutions, *Use of Charge Cards in Federal Government— A Great Success Story* (visited July 17, 2000) <<http://policyworks.gov/org/main/mg/intergov/PC-Frontpg.htm>>.

- cost efficiencies in contractor services and prices,
- improvements in the coordination and delivery of services,
- greater accountability of government funds and improved performance reporting,
- greater cardholder convenience and flexibility,
- consolidation of accounting and reporting data leading to improved financial management,
- net reduction of information, accounting data, and processing redundancies thereby simplifying financial processes,
- consolidation of payments and overhead,
- reduction/elimination of imprest funds,<sup>107</sup>
- leveraging of the costs of investment for new systems and technology,
- expansion of card services available through integrated card solutions, and
- reduction of single card systems,
- adoption of commercial rules, procedures, and best practices, and
- leveraging of state-of-art technology and technological advances.<sup>108</sup>

#### **D. Technological Advances**

The SmartPay program aspires to provide agencies with the tools to reengineer and reinvent government purchase and payment procedures by providing access to innovative multi-functional “smart cards,” as opposed to conventional single purpose

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<sup>107</sup> “‘Imprest fund’ means a cash fund of a fixed amount established by an advance of funds, without charge to an appropriation, from an agency finance or disbursing officer to a duly appointed cashier, for disbursement as needed from time to time in making payment in cash for relatively small amounts.” FAR 13.001.

magnetic strip cards. If the smart card technology lives up to its advance billing, ultimately, every government employee will carry a single smart card for a wide range of purposes, including identification, building access, travel expenses, and small purchases.<sup>109</sup> By 2001, GSA intends to make available to all federal agencies a multi-function smart card that can be tailored to agency requirements.<sup>110</sup> While these multi-function cards may enhance the efficiency of many government employees, the benefits do not stop there. The Government also envisions that greatly expanded use of these cards will facilitate the Government's ongoing migration from primarily paper-based acquisition practices to emerging electronic commerce acquisition systems.<sup>111</sup>

The Government now uses purchase cards not only as an integrated method of acquisition, but also as a method of *payment* where other acquisition methods are employed. In other words, the Government also uses these cards solely to *pay*

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<sup>108</sup> SmartPay Contract, *supra* note 91, at 131, 137.

<sup>109</sup> Temoshok, *supra* note 68, at slides 7-8; SmartPay Contract, *supra* note 91, at 190; see also Report to Congress on the Use of Smart Card Technology in the Department of Defense 7-13 (detailing ongoing military smart card applications) (visited July 17, 2000) <[http://smart.gov/information/DoD\\_report\\_congress.doc](http://smart.gov/information/DoD_report_congress.doc)>, DoD Smart Card Information Briefing (visited July 17, 2000) <[http://smart.gov/information/schwarzhoff\\_pp0200/terry\\_schwarzhoff.htm](http://smart.gov/information/schwarzhoff_pp0200/terry_schwarzhoff.htm)> (outlining DoD's plans to field smart cards to all military personnel by 2003).

<sup>110</sup> Temoshok, *supra* note 68, at slide 19.

<sup>111</sup> Federal Card Services Task Force, Electronic Processes Initiatives Committee, *Federal Smart Card Implementation Plan: "The Future is in the Cards"* (1998) (visited July 17, 2000) <<http://policyworks.gov/org/main/me/epic/scards.html>>.

invoices submitted pursuant to traditional government contracting methods (e.g., sealed bid or negotiated contracts).<sup>112</sup>

#### IV. PURCHASE CARD PROCEDURES & RESTRICTIONS

While government adoption of charge cards as a method of acquisition can hardly be considered a sea change in government procurement, allowing non-procurement personnel to bind the government represents a truly revolutionary change in government acquisition law and policy. The long-standing traditional rule is that only duly appointed “contracting officers” possess the sole authority to bind the government in contract.<sup>113</sup>

##### A. Delegation of Acquisition Authority

Contracting authority flows from the President through the head of the agency.<sup>114</sup> Agency chiefs delegate contracting authority to contracting officers who are authorized to bind the Government.<sup>115</sup> However, Congress broke from this long-standing rule in FASA when it authorized non-procurement officials to bind the Government in contracts valued at \$2,500 or less.<sup>116</sup> Purchase cardholders are

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<sup>112</sup> Office of Management and Budget, *Electronic Purchasing and Payment in the Federal Government, Annual Report to Congress* 22 (1999)  
<<http://policyworks.gov/org/main/me/epic/ecreport.pdf>>.

<sup>113</sup> FAR 1.601(a); *El Centro v United States*, 922 F.2d 816, 820-21 (Fed. Cir. 1990); JOHN CIBINIC JR. & RALPH C. NASH JR., FORMATION OF GOVERNMENT CONTRACTS 80-84 (3d ed. 1998).

<sup>114</sup> CIBINIC & NASH, *supra* note 113, at 83; FAR 1.601(a).

<sup>115</sup> CIBINIC & NASH, *supra* note 113, at 83-84; FAR 1.601(a).

<sup>116</sup> FASA, Pub. L. No. 103-355, § 4301(a), 41 U.S.C. § 428.

normally from agency program offices.<sup>117</sup> As such, they lack the extensive formal training required for government procurement officials.<sup>118</sup>

## B. Micro-purchase Exemptions

### 1. *Small Business Reservation Exemption*

Under FASA, micro-purchases are exempt from the small business reservation (contracts valued at \$100,000 or less are otherwise reserved for small businesses).<sup>119</sup> While this exemption may, on initial impression, seem to be of little consequence to small businesses, closer scrutiny reveals a significant impact on small businesses. The impact of the micro-purchase exemption from the small business reservation is discussed further in Part VI.E below.

### 2. *Buy American Act Exemption*

FASA also exempts micro-purchases from the Buy American Act.<sup>120</sup> This exemption permits cardholders to make purchases without regard to the source of the items purchased. As purchase card use continues to grow, this represents an ever-increasing volume of federal dollars potentially adding to the trade imbalance through the purchase of non-American made goods. This exemption also harms small businesses by substantially increasing the menu of product choices available for purchase.

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<sup>117</sup> Gen. Acct. Off., *Acquisition Reform Purchase Card Use Cuts Procurement Costs, Improves Efficiency*, Rept. No. GAO/NSIAD-96-138, at 9 (1996).

<sup>118</sup> See *infra* text accompanying notes 278-281.

<sup>119</sup> FASA, Pub. L. No. 103-355, § 4301(a), 41 U.S.C. § 428(b); 15 U.S.C. § 644(j).

### *3. Competition Exemption*

The third major micro-purchase exemption is the competition exemption.<sup>121</sup>

Under FASA, micro-purchases do not require competitive quotations, nor are they even encouraged, as long as the purchase price is deemed “reasonable.”<sup>122</sup> The FAR suggests that in many instances no effort is even required to verify price reasonableness: “The administrative cost of verifying the reasonableness of the price for purchases may more than offset potential savings from detecting instances of overpricing.”<sup>123</sup> As a result, the regulations suggest only limited scenarios in which purchasers should confirm that micro-purchase prices are, in fact, reasonable.

## **C. Program Requirements and Restrictions**

### *1. Required Sources of Supply & Services*

Notwithstanding the micro-purchase exemptions discussed above, with few exceptions,<sup>124</sup> the remainder of the multitudinous federal procurement laws and

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<sup>120</sup> FASA, Pub. L. No. 103-355, § 4301(a), 41 U.S.C. § 428(b).

<sup>121</sup> FASA, Pub. L. No. 103-355, § 4301(a), 41 U.S.C. § 428(c); FAR 13.202(a)(2).

<sup>122</sup> FASA, Pub. L. No. 103-355, § 4301, 41 U.S.C. § 428(c).

<sup>123</sup> FAR 13.202(a)(3).

<sup>124</sup> The following laws are inapplicable to contracting actions below the simplified acquisition threshold (\$100,000): (1) Anti-Kickback Act of 1986, 41 U.S.C. § 57(a)-(b) (only the requirement for the incorporation of the contractor procedures for the prevention and detection of violations, and the contractual requirement for contractor cooperation in investigations are inapplicable); (2) Miller Act, 40 U.S.C. § 270a; (3) Contract Work Hours and Safety Standards Act--Overtime Compensation, 40 U.S.C. §§ 327-333; (4) Section 5152 of the Drug-Free Workplace Act of 1988, 41 U.S.C. § 701(a)(1) (except for individuals); (5) Solid Waste Disposal Act, 42 U.S.C. § 6962; (only the requirement for providing the estimate of recovered material

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regulations apply to micro-purchases. The most significant and most overlooked of these other procurement restrictions is the FAR Part 8 required sources provisions,<sup>125</sup> which the FAR explicitly makes applicable to micro-purchases.<sup>126</sup>

Procurement laws and regulations mandate use of certain *required* sources before considering purchase from commercial sources,<sup>127</sup> with certain minor exceptions<sup>128</sup> and absent unusual and compelling urgencies.<sup>129</sup> For supplies, Government agencies must satisfy their requirements from the following sources, in descending order of priority, before resorting to commercial sources:

- (1) excesses from other Government agencies,

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utilized in the performance of the contract is inapplicable); (6) Contract Clause Regarding Contingent Fees, 10 U.S.C. § 2306(b) and 41 U.S.C. § 254(a); (7) Authority to Examine Books and Records of Contractors, 10 U.S.C. § 2313 and 41 U.S.C. § 254(c); (8) Prohibition on Limiting Subcontractor Direct Sales to the United States, 10 U.S.C. § 2402 and 41 U.S.C. § 253g; (9) HUBZone Act of 1997, 15 U.S.C. § 631 note (except for 15 U.S.C. § 657a(b)(2)(B), which is optional for the agencies subject to the requirements of the Act). FAR 13.005(a); FAR 2.101 (“‘Simplified acquisition threshold’ means \$100,000”).

<sup>125</sup> FAR Part 8— Required Sources of Supplies and Services.

<sup>126</sup> FAR 13.101(e).

<sup>127</sup> FAR 13.201(e).

<sup>128</sup> E.g., public utility services, printing supplies, and motor vehicles. FAR 8.002.

<sup>129</sup> FAR 8.001(b). Examples include: “(i) Supplies, services, or construction needed at once because of fire, flood, explosion, or other disaster; (ii) Essential equipment or repair needed at once to—(A) Comply with orders for a ship; (B) Perform the operational mission of an aircraft; or (C) Preclude impairment of launch capabilities or mission performance of missiles or missile support equipment. (iii) Construction needed at once to preserve a structure or its contents from damage.” DFARS 206-302-2(b); *see also* CIBINIC & NASH, *supra* note 113, at 295-98.

- (2) Federal Prison Industries,
- (3) products available from the Committee for Purchase From People Who Are Blind or Severely Disabled—Javits-Wagner-O'Day (JWOD) Program,<sup>130</sup>
- (4) Government wholesale supply sources (e.g., Government Services Agency or the Defense Logistics Agency), and
- (5) Federal Supply Schedules.<sup>131</sup>

Similarly, when purchasing *services* from commercial sources, government agencies must satisfy requirements from the following sources, in descending order of priority:

- (1) Services available from the Committee for Purchase From People Who Are Blind or Severely Disabled (JWOD program),
- (2) Mandatory Federal Supply Schedules,
- (3) Optional use Federal Supply Schedules, and
- (4) Federal Prison Industries, educational institutions, or nonprofit institutions.<sup>132</sup>

Until recently, the purchasing mechanisms for UNICOR (the trade name for Federal Prison Industries),<sup>133</sup> the National Industries for the Blind (NIB),<sup>134</sup> and the

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<sup>130</sup> Named for its enabling legislation, the Javits-Wagner-O'Day Act of 1971, 41 U.S.C. §§ 46-48c, the JWOD Program is a mandatory source of supply for Federal employees. The JWOD Program is administered by the Committee for Purchase From People Who Are Blind or Severely Disabled. Two national, independent organizations, National Industries for the Blind (NIB) and NISH, help state and private nonprofit agencies participate in the JWOD Program. JWOD website (visited June 18, 2000) <<http://www.jwod.com>>.

<sup>131</sup> FAR 8.001(a)(1).

<sup>132</sup> FAR 8.001(a)(2).

<sup>133</sup> UNICOR is the trade name for Federal Prison Industries, Inc. It is part of the Federal Bureau of Prisons within the Department of Justice and has been supplying goods to Federal customers since 1934. Its primary mission is productive employment of inmates. UNICOR receives no congressional appropriations and is self-sustaining. UNICOR website (visited June 18, 2000) <<http://www.unicor.gov>>.

National Industries for the Severely Handicapped (NISH)<sup>135</sup> were not customer friendly— product descriptions and availability information were difficult to obtain. However, the Internet has put this information on the desktop of every federal buyer, which makes purchasing from these required sources easier than ever, especially when using the government purchase card.<sup>136</sup>

Nevertheless, with the proliferation of the government purchase card, government buyers have been abandoning the JWOD program in favor of retail products offered by large businesses.<sup>137</sup> In response to this change in government

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<sup>134</sup> The National Industries for the Blind (NIB) “is a private, not-for-profit corporation whose mission is to enhance the opportunities for economic and personal independence of persons who are blind, primarily through creating, sustaining and improving employment. Headquartered in Alexandria, Virginia, NIB accomplishes its mission by developing business opportunities in the federal, state, and commercial marketplaces for 88 associated agencies operating 120 industries in 38 states, Puerto Rico and the District of Columbia.” NIB website (visited June 18, 2000) <<http://www.nib.org>>.

<sup>135</sup> “NISH is the national nonprofit agency designated by the Committee for Purchase From People Who Are Blind Or Severely Disabled to provide technical assistance to Community Rehabilitation Programs (CRPs) interested in obtaining federal contracts under the Javits-Wagner-O’Day (JWOD) Program. NISH was established in 1974 and currently provides information and services to more than 1,800 CRPs nationwide who are Associated with NISH; nearly 600 of which are presently providing services or producing products under the JWOD Program. NISH’s role also includes working with Procurement Agencies which are the federal entities that purchase the products and services provided by the CRPs employing individuals with disabilities.” NISH website (visited June 18, 2000) <<http://www.nish.org>>.

<sup>136</sup> UNICOR’s product information is available at their website (visited July 17, 2000) <<http://www.unicor.gov>>. NIB/NISH product information is available in the Javits-Wagner-O’Day website (visited July 17, 2000) <<http://www.jwod.com>>.

<sup>137</sup> Adorado B. Yabut, Jr., The Government Purchase Card Under the Federal Acquisition Streamlining Act of 1994: A Small Business Perspective 41, 52 (1997) (continued ... )

purchasing behavior, in February 1999, Diedre Lee (then Administrator of the Office of Federal Procurement Policy) issued a memorandum to senior agency procurement executives “clarify[ing] the applicability of [JWOD] to micro-purchases.”<sup>138</sup> She noted that JWOD is a mandatory source of supply for federal purchases and had not been waived for micro-purchases. In October 1999, Administrator Lee again reiterated the Administration’s commitment to JWOD program and asked agencies to take extra steps to ensure government employees entrusted with purchase cards are utilizing the JWOD program in light of GSA’s planned shutdown of eight supply centers that traditionally supplied JWOD products to government offices.<sup>139</sup> She requested agency procurement staffs to collaborate with the Committee for Purchase From People Who Are Blind or Severely Disabled to explore methods of increasing JWOD purchases.<sup>140</sup>

In March 2000, President Clinton issued a memorandum for the Heads of Executive Departments and Agencies expressing continued commitment to the

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(Master’s thesis, Naval Postgraduate School) (on file at the Defense Technical Information Center, Accession Number ADA341776 <<http://stinet.dtic.mil>> (finding 64 percent of purchase card transactions made from large businesses in a random sample of 100 transactions).

<sup>138</sup> Memorandum from Deidre Lee to Senior Agency Procurement Executives, Applicability of the Javits-Wagner-O’Day Program for Micro-purchases (Feb. 16, 1999) <[http://purchasecard.sarda.army.mil/jwod\\_memo.html](http://purchasecard.sarda.army.mil/jwod_memo.html)>.

<sup>139</sup> *GSA: OFPP Urges Agencies to Support JWOD Program for Blind, Disabled*, 72 Fed. Cont. Rep. 403 (Oct. 11, 1999).

<sup>140</sup> *Id.*

JWOD program.<sup>141</sup> President Clinton noted that the government's shift to making high-volume-small-dollar purchases with purchase cards wielded by non-procurement personnel has diminished government participation in the JWOD program.<sup>142</sup> He reminded agencies that as the government purchasing regime evolves toward electronic commerce, employees entrusted with purchase cards must be vigilant in their support of the JWOD program.<sup>143</sup> The necessity of these repeated reminders are a strong indication of purchase cardholders' reluctance to fulfill statutory purchasing mandates.

## *2. Authorization Controls*

The SmartPay contract provides for an elaborate system of authorization controls designed to prevent improper use of the card as well as to provide enhanced accountability of cardholders. Non-procurement cardholders are limited to transaction values of \$2,500 or less (the micro-purchase threshold).<sup>144</sup> Individual Government agencies may set additional authorization controls tailored to agency

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<sup>141</sup> Memorandum from President Clinton to the Heads of Executive Departments and Agencies, *Continued Commitment to the Jarvis-Wagner-O'Day Program* (Mar. 29, 2000), available online at <<http://www.pub.whitehouse.gov/WH/Publications/html/Publications.html>>, see also JWOD website <<http://www.jwod.com/memorandum.asp>>.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> FAR 1.603-3(b); FAR 13.301(a). Contracting officers may use the government purchase card to place task or delivery orders in amounts above the micro-purchase threshold. FAR 13.301(b)-(c).

procedures and trust of their cardholders.<sup>145</sup> The contract provides as examples the following types of additional authorization controls: dollars per transaction limit, dollars per month limit, transactions per day limit, transactions per month limit, merchant category code restrictions, and preferred supplier thresholds and restrictions.<sup>146</sup> Agencies set forth desired authorization controls in the agency-tailored task order.<sup>147</sup>

### *3. Rotation of Sources*

Congress recognized the potential for abuse of the purchase card in light of the program's exemption from competition requirements and the small business reservation. FASA included a provision that required micro-purchases to be "distributed equitably among qualified suppliers."<sup>148</sup> This rule is codified at FAR at section 13.202(a). Interestingly, the FAR rule includes language that waters down this Congressional requirement: "*To the extent practicable*, micro-purchases shall be distributed equitably among qualified suppliers."<sup>149</sup> The FAR Council has no authority to loosen the statutory requirement. Regardless, once published in the FAR, this language becomes equivalent to gospel. Government compliance with this provision is difficult to evaluate however, because as discussed more fully below,

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<sup>145</sup> SmartPay Contract, *supra* note 91, at 152-53, 210.

<sup>146</sup> *Id.* at 152-53.

<sup>147</sup> See GSA Task Order Guide for Fleet, Travel and Purchase Cards (visited June 21, 2000) <<http://www.fss.gsa.gov/services/gsa-smartpay/fm/guide2.cfm>>.

<sup>148</sup> FASA, Pub. L. No. 103-355, § 4301.

<sup>149</sup> FAR 13.202(a) (emphasis added).

GSA includes only a brief summary of purchase card transaction data in the annual Federal Procurement Report.<sup>150</sup>

#### 4. Government Tax Exemption

Purchase card transactions are not subject to state and local taxes.<sup>151</sup> As Figure 2 indicates, notice of the Federal Government tax exemption appears on the face of the card—"United States Government Tax Exempt."<sup>152</sup>



Figure 2—Graphic Image of Purchase Card<sup>153</sup>

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<sup>150</sup> See discussion *infra* Part VI.C.1.

<sup>151</sup> SmartPay Contract, *supra* note 91, at 153 ("Transactions against Federal Government accounts that are directly paid by the Government are exempt from state and local taxes."); *see also* FAR 29.302 ("Generally, purchases and leases made by the Federal Government are immune from State and local taxation.").

<sup>152</sup> SmartPay Contract, *supra* note 91, at 209-10.

<sup>153</sup> GSA SmartPay website (visited July 17, 2000) <<http://www.fss.gsa.gov/services/gsa-smartpay/fm/newcards.cfm>>. The graphic on the left is the standard purchase card. The graphic on the right is an integrated card that combines the purchase card with either a travel card or a fleet card. The Department of Interior task order provides for all three lines (purchase, travel, and fleet) on integrated cards. GSA Federal Supply Service Briefing, Managing Your Card Program, Slide 18 (visited July 23, 2000) <<http://www.fss.gsa.gov/services/gsa-smartpay/expo2web.ppt>>. Purchase cards may also be generically embossed (e.g., standard VISA card) when required for security reasons. SmartPay contract, *supra* note 91, at 143.

Cardholders are required to verify that the dollar amount of the purchase is correct and no state or local sales taxes have been included in the purchase price.<sup>154</sup> If sales tax is inadvertently included in the purchase, the Government is liable for the charge unless the vendor voluntarily issues a credit.<sup>155</sup>

##### *5. No Contracts with Government Employees*

Cardholders are prohibited from knowingly making purchases from small business concerns owned or controlled by government employees.<sup>156</sup> The purpose of this rule, which applies to all government contracts, is to avoid conflict of interests that might arise between the employees' personal interests and their Government duties as well as to avoid any appearance of favoritism or preferential treatment by the Government toward its own employees.<sup>157</sup> Exceptions are allowed for

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<sup>154</sup> E.g., Air Force Logistics Management Agency, *Air Force Government-Wide Purchase Cardholder Training*, Module 3, Slide 14 Notes (Proj. # LC9800900) (CD-ROM) (1998) (on file at the Defense Technical Information Center, Accession Number ADM000820 <<http://stinet.dtic.mil>>).

<sup>155</sup> Air Force Logistics Management Agency, *Air Force Government-Wide Purchase Cardholder Training*, Module 2, Slide 25 Notes (Proj. # LC9800900) (CD-ROM) (1998) (on file at the Defense Technical Information Center, Accession Number ADM000820 <<http://stinet.dtic.mil>>); U.S. Department of State, *Worldwide "SmartPay" Purchase Card Training Program*, Slide 52 (June 23, 1999) <<http://www.statebuy.gov/pcard>>.

<sup>156</sup> FAR 3.601(a); see also Philip Luci, Jr., *Contracting With Government Employees: An Overly Restrictive Rule, a Comparison, and a Compromise*, 27 PUB. CON. L. J. 37 (1997) (detailing the restriction, its problems, and proposing a compromise).

<sup>157</sup> Air Force Logistics Management Agency, *Air Force Government-Wide Purchase Cardholder Training*, Module 3, Slide 15 Notes (Proj. # LC9800900) (CD-ROM) (1998) (on file at the Defense Technical Information Center, Accession Number ADM000820 <<http://stinet.dtic.mil>>).

government employees performing special services (e.g., expert witnesses, advisors, or consultants).<sup>158</sup> In addition, the head of the agency may authorize exceptions when justified by compelling reasons.<sup>159</sup>

#### *6. Backordering*

Backordering is generally prohibited under the purchase card program. The FAR generally prohibits use of contracting financing (e.g., advance payments and progress payments) for purchases made under micro-purchase authority.<sup>160</sup> Thus, all supplies or services purchased must be provided to the government in the current billing cycle.<sup>161</sup> The supplies must be received or the services must be completed before the item appears on a statement of account received from the purchase card contractor.<sup>162</sup> Exceptions to this rule exist for certain categories of purchases where advance payments are specifically authorized (e.g., subscriptions to magazines and periodicals).<sup>163</sup> Also, when a vendor is willing not to submit the purchase card

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<sup>158</sup> FAR 3.601(b).

<sup>159</sup> FAR 3.602.

<sup>160</sup> FAR 32.003 (“Unless agency regulations otherwise permit, contract financing shall not be provided for purchases made under the authority of Part 13.”).

<sup>161</sup> Air Force Logistics Management Agency, *Air Force Government-Wide Purchase Cardholder Training*, Module 3, Slide 16 Notes (Proj. # LC9800900) (CD-ROM) (1998) (on file at the Defense Technical Information Center, Accession Number ADM000820 <<http://stinet.dtic.mil>>).

<sup>162</sup> *Id.*

<sup>163</sup> FAR 32.404(a)(6); Air Force Logistics Management Agency, *Air Force Government-Wide Purchase Cardholder Training*, Module 3, Slide 16 Notes (Proj. # LC9800900) (CD-ROM) (1998) (on file at the Defense Technical Information Center, Accession Number ADM000820 <<http://stinet.dtic.mil>>).

transaction for payment until all supplies are shipped or all services are completed, then the transaction is allowable.<sup>164</sup> Supplies purchased with the purchase card over the Internet or by telephone must be delivered by the merchant within the purchase card thirty-day billing cycle. If an item is not available immediately, back ordering is allowed only if the vendor is willing not to submit the purchase card transaction for payment until all items are shipped.<sup>165</sup>

#### *7. Green Buying Requirements*

The Resource Conservation and Recovery Act<sup>166</sup> requires government agencies to use recycled and recovered materials for certain items to the maximum extent possible.<sup>167</sup> The Environmental Protection Agency (EPA) has developed buy-recycled Comprehensive Procurement Guidelines (CPG) and posted them on the World Wide Web.<sup>168</sup> As the EPA notes on the CPG website, "Today, more and more products are made from recycled materials—from the carpeting and insulation

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<sup>164</sup> Air Force Logistics Management Agency, *Air Force Government-Wide Purchase Cardholder Training*, Module 3, Slide 16 Notes (Proj. # LC9800900) (CD-ROM) (1998) (on file at the Defense Technical Information Center, Accession Number ADM000820 <<http://stinet.dtic.mil>>).

<sup>165</sup> *Id.*

<sup>166</sup> 42 U.S.C. §§ 6901-6991.

<sup>167</sup> 42 U.S.C. § 6962; *see also* Exec. Order No. 13,101, Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition, 63 Fed. Reg. 49,643, 49,644 (1998); Air Force Logistics Management Agency, *Air Force Government-Wide Purchase Cardholder Training*, Module 3, Slide 18 Notes (Proj. # LC9800900) (CD-ROM) (1998) (on file at the Defense Technical Information Center, Accession Number ADM000820 <<http://stinet.dtic.mil>>).

<sup>168</sup> EPA Comprehensive Procurement Guidelines (visited July 1, 2000) <<http://www.epa.gov/cpg>>.

used in office buildings, to the reams of office paper purchased each day. Buying recycled helps ‘close the recycling loop’ by putting the materials we collect through recycling programs back to good use as products in the marketplace.”<sup>169</sup>

The legal requirement to procure products containing recovered materials applies to procuring agencies that spend more than \$10,000 annually on that particular item.<sup>170</sup> Once the EPA designates a product for a CPG purchasing preference after a public notice and comment process, “procuring agencies are required to purchase it with the highest recovered material content level practicable.”<sup>171</sup> Exceptions from the recycled buying program are allowed when the cost of the item is unreasonable; items are not available within a reasonable period; items do not meet reasonable agency performance requirements; or when inadequate competition exists.<sup>172</sup> The EPA has designated fifty-four products in eight categories:

- construction products,
- landscaping products,
- nonpaper office products,
- paper products,
- park and recreation products,

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<sup>169</sup> *Id.*

<sup>170</sup> EPA Comprehensive Procurement Guidelines, *Frequently Asked Questions*, Question # 3 (visited July 1, 2000) <<http://www.epa.gov/cpg/faqs.htm#quest3>>

<sup>171</sup> EPA Comprehensive Procurement Guidelines (visited July 1, 2000) <<http://www.epa.gov/cpg/about.htm>>.

<sup>172</sup> EPA Comprehensive Procurement Guidelines, *Frequently Asked Questions*, Question # 3 (visited July 1, 2000) <<http://www.epa.gov/cpg/faqs.htm#quest3>>.

- transportation products,
- vehicular products, and
- miscellaneous products.<sup>173</sup>

#### *8. Splitting Requirements*

Splitting requirements into multiple purchases with the intent of avoiding requirements applicable to purchases exceeding the micro-purchase threshold is prohibited.<sup>174</sup> Acquisitions of requirements valued over \$2,500 are subject to the micro-purchase exemption from the small business reservation, the Buy American

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<sup>173</sup> EPA Fact Sheet, *EPA Expands Comprehensive Procurement Guidelines* (visited July 1, 2000) <<http://www.epa.gov/cpg/pdf/cpgfs-00.pdf>>. The CPG designated items are as follows, listed by category: *Construction Products*— building insulation products, carpet, carpet cushion, cement and concrete containing coal fly ash or ground granulated blast furnace slag, consolidated and reprocessed latex paint, floor tiles, flowable fill, laminated paperboard, patio blocks, railroad grade crossing surfaces, shower and restroom dividers/partitions, and structural fiberboard; *Landscaping Products*— garden and soaker hoses, hydraulic mulch, plastic lumber landscaping timbers and posts, lawn and garden edging, and compost made from yard trimmings or food waste; *Nonpaper Office Products*— binders, clipboards, file folders, clip portfolios, and presentation folders, office recycling containers, office waste receptacles, plastic desktop accessories, plastic envelopes, plastic trash bags, printer ribbons, and toner cartridges; *Paper and Paper Products*— commercial/industrial sanitary tissue products, miscellaneous papers, newsprint, paperboard and packaging products, and printing/writing papers; *Park and Recreation Products*— park benches and picnic tables, plastic fencing, playground equipment, playground surfaces, and running tracks; *Transportation Products*— channelizers, delineators, flexible delineators, parking stops, traffic barricades, and traffic cones; *Vehicular Products*— engine coolants, re-refined lubricating oils, and retread tires; *Miscellaneous Products*— awards and plaques, industrial drums, mats, pallets, signage, sorbents, and manual-grade strapping. There are no additional products currently proposed for addition to the CPG procurement preference program. EPA Comprehensive Procurement Guidelines website (visited July 1, 2000) <<http://www.epa.gov/cpg/products.htm>>.

<sup>174</sup> See, e.g., U.S. Army Space and Missile Defense Command, *Commercial Credit Card Program ¶ 7.b(1)* (visited July 17, 2000) <<http://www.smdc.army.mil/Contracts/CreditCard/Pamphlet.html>>.

Act, and the competition requirement.<sup>175</sup> The purchase card can only be used by non-procurement personnel for purchases of \$2,500 or less.<sup>176</sup> Purchase splitting, when done with the intent to avoid these restrictions, violates the micro-purchase threshold.<sup>177</sup>

#### 9. Authorized Uses

The primary rule is that the purchase card is for official use only.<sup>178</sup> Examples of the types of goods and services authorized for purchase by non-procurement personnel with the government purchase card include:

- office supplies;
- personal computers;
- copiers, supplies, and maintenance;
- fax machines, supplies, and maintenance;
- books and subscriptions;
- mail and transportation services (e.g., FED EX);
- recurring services not exceeding \$2,500 annually;
- printing and copying services; and
- training costs.<sup>179</sup>

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<sup>175</sup> See discussion *supra* Parts IV.B.1-IV.B.3.

<sup>176</sup> FAR 1.603-3(b), FAR 13.301(a).

<sup>177</sup> FAR 13.003(c)(2); U.S. Army Materiel Command, Government Purchase Cardholder And Billing Official Training, Module 3, Slide 3 (visited July 3, 2000) <<http://www.amc.army.mil/amc/rda/rda-ap/impactut.html>>.

<sup>178</sup> SmartPay Contract, *supra* note 91, at 143.

Agencies may prohibit or restrict purchases of certain supplies or services by designating certain merchant category codes as restricted from purchase card transactions.<sup>180</sup> In such instances, the card vendor will program the card to be rejected at merchants with those merchant category codes.<sup>181</sup> Agencies may also require preauthorization before certain supplies are purchased with the purchase card.

#### *10. Purchases Requiring Preauthorization*

Many agencies have promulgated regulations requiring preauthorization before certain supplies or services or classes of supplies or services are purchased. For example, the Air Force requires preauthorization from certain organizations or officials before the following items are procured with the purchase card:

- hazardous and potentially hazardous materials (e.g., acetone, alcohol, benzol, ether, gasoline, naphtha, pesticides, refrigerants, poisons, radioactive materials, corrosive materials, equipment cleaning solvents, color toner for printers, etc.);
- communication and computer equipment and software;
- telephone instruments and expansion plug-in cards (to ensure compatibility);
- medical items;
- paid advertisements;
- visual information, electronic digital imaging and video equipment and services;

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(... continued from previous page)

<sup>179</sup> U.S. Department of State, *Worldwide "SmartPay" Purchase Card Training Program*, Slides 42-44 (June 23, 1999) <<http://www.statebuy.gov/pcard>>.

<sup>180</sup> SmartPay Contract, *supra* note 91, at 153.

<sup>181</sup> *Id.*

- rental or lease of motor vehicles;
- rental or lease of materials handling equipment or aircraft support equipment (i.e., aircraft staircases; baggage handling equipment) when required to sustain operations at deployed locations or home station surges;
- centrally managed items related to weapon systems;
- repair services (to ensure that the repair is not already covered by an existing maintenance agreement);
- class I ozone depleting substances;
- construction services;
- civil engineer materials and real property; and
- purchase of professional services (e.g., accountants, lawyers, architects, engineers, physicians, dentists, etc.).<sup>182</sup>

In keeping with the spirit of the purchase card program's goal of convenience and flexibility, verbal or telephonic approval is sufficient.<sup>183</sup> The cardholder then annotates the purchase log with the identity of the authorizing official.<sup>184</sup>

### *11. Unauthorized Uses*

The SmartPay contract requires the card vendor to prevent purchase card acquisitions for:

- long-term rental or lease of land or buildings;
- travel or travel-related expenses (excluding conference rooms, meeting spaces, and local transportation services); and

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<sup>182</sup> USAF Internal Procedures For Using The IMPAC, § 3.2 (visited July 2, 2000) <[http://www.safaq.hq.af.mil/contracting/toolkit/impac/im\\_guide.html](http://www.safaq.hq.af.mil/contracting/toolkit/impac/im_guide.html)>.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

- cash advances (unless selected as a value added option under the agency or organization task order).<sup>185</sup>

Agencies may designate additional supplies or services as unauthorized for acquisition with the purchase card as well. For example, the National Institutes of Health's list of unauthorized transactions follows:

- cash advances;
- any item intended for personal convenience or consumption;
- rental or lease of motor vehicles, land, or buildings;
- telephone calls (e.g., such as business calls while away from the office);
- travel (including METRO Fare Card use for local travel, hotels, entertainment or meals— This restriction is necessary because of the GSA American Express Card and the different accounting and reporting requirements for travel.) (EXCEPTION: Official entertainment as outlined in NIH Policy Manual Issuance 1160-1, “Official Entertaining” is authorized to be procured using I.M.P.A.C. if the procedures outlined in 1160-1 have been followed. CAUTION: Restaurants in hotels may not be able to accept the card because the Merchant Codes for “Hotel” vendors are not authorized for use with the NIH I.M.P.A.C. card);
- business cards;
- services that require a written statement of work, due to the complexity of the requirement or their non-routine nature;
- purchase of items that will be delivered in multiple shipments;
- memberships in organizations or clubs for individuals (memberships for NIH organizational components is authorized);
- construction;
- architectural and engineering services;

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<sup>185</sup> SmartPay Contract, *supra* note 91, at 210.

- controlled substances;
- radioisotopes;
- safety glasses or prescription glasses; and
- government furnished property.<sup>186</sup>

Intentional use of the government purchase card for other than official government business may be considered a larceny against the United States, which could lead to disciplinary action or criminal prosecution.<sup>187</sup>

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<sup>186</sup> NIH Policy Manual 6013-2/26013-2, Internal Procedures For The Purchase Card (I.M.P.A.C) Program, Attachment 1 (visited July 3, 2000)

<<http://www3.od.nih.gov/oma/manualchapters/contracts/6013-2>>. As the NIH example shows, agency unauthorized purchase list are generally tailored to unique agency practices. The unauthorized purchase list for the Kennedy Space Center (KSC) is: cash advances, rental or lease of land or buildings, telecommunications (telephone) services and equipment (e.g. beepers, cellular phones, fax machines, etc.), purchase of airline, bus, train or other travel related activities, purchase of meals, drinks, lodging, or other travel or subsistence costs, purchase of gasoline or oil, repair of GSA vehicle, hazardous materials (exception: materiel safety data sheets), janitorial, yard and maintenance services other than repair services, personal clothing or footwear ( does not include safety shoes and safety glasses), printing or copying services, telephone calls, business/calling/greeting cards, construction work, personal service contracts, training, maintenance agreements, library subscriptions or library books, quality sensitive items requiring functional testing, information technology purchases, microwaves and refrigerators, and extended warranties. In the spirit of flexibility and convenience of the program, KSC allows exceptions based on written permission (e-mail) from the procurement office. KSC Purchase Card Operating Manual, Appendix C (June 2000) (visited July 3, 2000)

<<http://www.ksc.nasa.gov/procurement/cc/AppC.htm>>. Obviously, the KSC procurement cannot approve exceptions for purchase card acquisitions prohibited in the SmartPay contract.

<sup>187</sup> 18 U.S.C. § 641; *United States v Brown*, 181 F.3d 92 (Table), 1999 WL 357175 (4th Cir. 1999); U.S. Army Space and Missile Defense Command, *Commercial Credit Card Program ¶7.c* (visited July 17, 2000)

<<http://www.smdc.army.mil/Contracts/CreditCard/Pamphlet.html>>.

## *12. Government Liability for Unauthorized Uses*

The SmartPay contract requires the Government to notify the purchase card vendor when it becomes apparent that there is possible unauthorized use of a government purchase card.<sup>188</sup> The Government is liable only for charges made by an authorized cardholder.<sup>189</sup> It is not liable for unauthorized use, defined in the contract as “the use of a credit card by a person, other than the cardholder, who does not have actual, implied or apparent authority for such use and from which the cardholder receives no benefit.”<sup>190</sup> When authorized cardholders make unauthorized charges, however, the Government is liable for the charge.<sup>191</sup> Seemingly obviated by the above contractual terms (i.e., the Government is not liable for charges made by unauthorized users), the contract also contains a provision limiting the Government’s liability for lost or stolen cards to \$50.<sup>192</sup>

## **D. Purchase Card Process**

While one of the primary goals of the purchase card program is convenience and flexibility, as the above discussion shows, there are still many rules and

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<sup>188</sup> SmartPay Contract, *supra* note 91, at 177.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* “When the centrally billed account/card has been used by an authorized account/cardholder to make an unauthorized purchase, the Government is liable for the charge.” DoD Purchase Card Program Management Office, *Policy/Procedures* (visited June 29, 2000) <<http://purchasecard.sarda.army.mil/2aPolicy.htm>>.

<sup>192</sup> *Id.*

regulations that apply to purchase card acquisitions.<sup>193</sup> This makes the purchase card process more complex than initially apparent. The purchase card process is as follows:

- (1) Determine that there is a legitimate government purchase requirement;
- (2) Determine if the purchase can be made with the government purchase card (ensure the supplies or services considered for purchase are authorized for acquisition with the government purchase card);
- (3) Ensure funds are available;
- (4) Accomplish required screening and precoordination, if required (e.g., purchase of hazardous materials usually requires precoordination and preauthorization);
- (5) Verify that the item not available from a FAR Part 8 mandatory source, such as agency inventories, UNICOR, NIB/NISH (JWOD), or wholesale supply sources;
- (6) Contact a vendor and obtain a price quote;
- (7) Determine whether the price quote is fair and reasonable. If so, purchase the item. If not, contact another vendor for another quote;
- (8) Ensure no state or local sales tax has been included in the final purchase price;
- (9) Document the purchase and get a receipt for government records; and
- (10) Use receipt for monthly reconciliation with the statement of account received from the purchase card vendor.<sup>194</sup>

While, in practice, cardholders can proceed directly to step 8, the procurement regulations actually require the government purchaser to go through an elaborate

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<sup>193</sup> See discussion *supra* Parts IV.C.1-IV.C.11.

<sup>194</sup> Air Force Logistics Management Agency, *Air Force Government-Wide Purchase Cardholder Training*, Module 1, Slide 29 (Proj. # LC9800900) (CD-ROM) (1998) (on file at the Defense Technical Information Center, Accession Number ADM000820 <<http://stinet.dtic.mil>>).

purchasing method. This raises the issue of training, especially in light of the fact that most purchase cardholders are not procurement officials.

### E. Training

Each agency has the individual responsibility of establishing a purchase card training program.<sup>195</sup> The success of these training programs is a crucial element in ensuring that public funds are not wasted or misused. As would be expected, the quality of training programs varies from agency to agency as well as from time to time. For example, the Air Force made quality purchase card training a high priority in 1998 with the production of a standardized training program available on CD-ROM.<sup>196</sup> The CD-ROM includes three multimedia presentation modules as well as three end-of-session interactive quizzes designed to test a trainee's comprehension of the material.<sup>197</sup>

Other agencies have likewise displayed initiative in developing innovative training programs. For example, the State Department created a website with comprehensive training materials that include not only the rules relating to the

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<sup>195</sup> Treasury Financial Manual, Vol. I, § 4525 (2000) <<http://www.fms.treas.gov/tfm/v1p4c450.txt>> (requiring federal agencies to develop internal procedures for using the government purchase card, including ensuring training is provided).

<sup>196</sup> Air Force Logistics Management Agency, *Air Force Government-Wide Purchase Cardholder Training* (Proj. # LC9800900) (CD-ROM) (1998) (on file at the Defense Technical Information Center, Accession Number ADM000820 <<http://stinet.dtic.mil>>).

<sup>197</sup> *Id.*

purchase program, but the policies behind the rules as well.<sup>198</sup> However, most agencies only require minimal training before purchase cardholders are sent off to the commercial world (or, more likely, the Internet) to purchase for the Government.<sup>199</sup> While a purchase cardholder need not be an expert in government contracting, without a basic understanding of the purchasing policies of the United States in addition to the bright-line purchasing rules, the purchase cardholder is destined to err. The United States' purchasing system is simply too complex to be outlined in a three-hour training class.

For example, in the Air Force training CD-ROM, purchasers are instructed that they must consider whether an item being considered for purchase is available from a required source along with a listing of these required sources. While such training communicates the basic rule, it fails to convey the purpose for the rule—that the policy of the United States is to support industries for the blind and severely handicapped through *government procurement*. Without an understanding of the policy behind these complex procurement rules, cardholders are likely to view them as more red tape, which the purchase card program is designed to avoid. The government's

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<sup>198</sup> Commercial Card Program for Department Of State, USAID, and Peace Corps (visited July 17, 2000) <<http://www.statebuy.gov/cc1.htm>>.

<sup>199</sup> E.g., USAF Internal Procedures For Using The IMPAC ¶ 5.3.3.3.1 (visited July 17, 2000) <[http://www.safaq.hq.af.mil/contracting/toolkit/impac/im\\_guide.html](http://www.safaq.hq.af.mil/contracting/toolkit/impac/im_guide.html)> (four hours recommended); Defense Service Supply-Washington Purchase Card Training Handout 5 (1999) (on file with author) (three hours of training). NASA's purchase card regulations do not specify a minimum amount of training, but instead requires "training adequate to ensure appropriate use of the purchase card." 48 C.F.R. § 1813.301(a)(i).

poor support of the JWOD program in the micro-purchase program is but one symptom of inadequate purchase card training provided to cardholders.<sup>200</sup>

The State Department training program goes further and conveys to cardholders that they, as government purchasers, are tasked with supporting federal policies requiring procurement support of disabled persons. State Department cardholders are trained that their buying actions provide jobs for disabled persons as well as save taxpayer dollars.<sup>201</sup> The State Department training program goes on to explain that the “Skilcraft” products familiar to all government employees are JWOD products, one of the required sources that must be used before a commercial market purchase is considered.<sup>202</sup> Cardholders are informed that not purchasing available JWOD products is not only against the rules, but it wastes taxpayers dollars and contributes to the loss of employment for disabled persons.<sup>203</sup> The State

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<sup>200</sup> See discussion *supra* Part IV.C.1.

<sup>201</sup> U.S. Department of State, *Worldwide “SmartPay” Purchase Card Training Program*, Slide 55 (visited August 18, 2000) <<http://www.statebuy.gov/pcard>>.

<sup>202</sup> U.S. Department of State, *Worldwide “SmartPay” Purchase Card Training Program*, Slide 56 (visited August 18, 2000) <<http://www.statebuy.gov/pcard>>. “There are no waivers to the requirement to buy JWOD Program supplies and services.” *Id.* at Slide 58.

<sup>203</sup> U.S. Department of State, *Worldwide “SmartPay” Purchase Card Training Program*, Slide 56 (visited August 18, 2000) <<http://www.statebuy.gov/pcard>>. “You have a lot of flexibility with your Purchase Cards. You will make many seemingly small buying decisions. For example, you might use your Purchase Card to buy a mouse pad. If you buy a JWOD mouse pad, you will get a high quality mouse pad at a reasonable cost, and YOU will help to provide jobs for people with severe disabilities. If you buy a non-JWOD mouse pad with ‘Bugs Bunny’ or ‘Dilbert’ on it, you’ll spend more taxpayer dollars, and YOUR buying decision will contribute to the loss of jobs by people with severe disabilities.” *Id.*

Department's purchase card training program tells cardholders where to find JWOD products available for immediate purchase as well as how to make telephone or electronic orders and arrange for next-day delivery.<sup>204</sup> Finally, the State Department training program goes the extra mile by providing contact information (telephone and e-mail) where cardholders can obtain further information concerning JWOD, NIB, and NISH products.<sup>205</sup>

Another example of complacency in agency purchase card training programs is reflected in the fact that many agencies have not updated their training programs or agency directives to reflect the current name of the purchase card program—SmartPay. Many agencies still conduct “IMPAC card training” or refer to the “IMPAC program” even though the IMPAC card program expired over twenty months ago.<sup>206</sup>

Thus, before cardholders are authorized to purchase for the Government, they should not only be trained through a mere overview of the basic purchasing rules, but

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<sup>204</sup> U.S. Department of State, *Worldwide “SmartPay” Purchase Card Training Program*, Slide 57 (visited August 18, 2000) <<http://www.statebuy.gov/pcard>>.

<sup>205</sup> U.S. Department of State, *Worldwide “SmartPay” Purchase Card Training Program*, Slide 59 (visited August 18, 2000) <<http://www.statebuy.gov/pcard>>.

<sup>206</sup> E.g., USAF Internal Procedures For Using The IMPAC (visited July 17, 2000) <[http://www.safaq.hq.af.mil/contracting/toolkit/impac/im\\_guide.html](http://www.safaq.hq.af.mil/contracting/toolkit/impac/im_guide.html)>, U.S. Army Government Purchase Card Program (I.M.P.A.C.) (visited July 17, 2000) <<http://www.asafm.army.mil/fo/impac/brf/impacbrf.htm>>, NASA Ames Research Center I.M.P.A.C. Bankcard Program (visited July 23, 2000) <<http://ccf.arc.nasa.gov/cf/cfg/bankcard/contacts.htm>>, DCAA Reading Room (visited July 23, 2000) <<http://www.dcaa.mil/readingroom.htm>>, HUD Directive 2212.1, Governmentwide Commercial Credit Card Program Handbook (visited July 17, 2000) available at <<http://www.hudclips.org>>.

they also should be exposed to the policy foundations giving rise to those rules. This is especially true given the purchase card's ever-increasing share of the federal procurement budget and efforts to increase the micro-purchase threshold.<sup>207</sup> Public interest demands that the government be thrifty with public funds. Public trust demands that government employees comply with the law.

## V. BENEFITS AND EFFICIENCIES OF THE PURCHASE CARD PROGRAM

The purchase card program has engendered widespread enthusiasm since its inception.<sup>208</sup> The Government has well chronicled the advantages and benefits of the program.<sup>209</sup> The primary benefits of the card are administrative efficiency, labor savings (especially important in this decade long era of procurement staff reductions), cardholder convenience and flexibility, shift of accounting workload to the private sector, and rebates.

### A. Administrative Efficiencies

Before the advent of the government purchase card, buying supplies and services valued less than \$2,500 was paper-intensive and labor-burdensome when compared to the value of the purchase. Procurement of simple office tools, such as books or furniture, involved a purchase order system that entailed several

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<sup>207</sup> See discussion *supra* Part II.F.

<sup>208</sup> See, e.g., 1998 GSA Annual Report 41 (chronicling the administrative savings achieved through the use of purchase cards).

<sup>209</sup> See, e.g., GSA SmartPay 1999 Executive Summary (visited July 17, 2000) <<http://www.fss.gsa.gov/services/gsa-smartpay/execsum.pdf>> (declaring \$1.1 billion in administrative savings from the purchase card program).

cumbersome steps.<sup>210</sup> First, clerical staff in the office needing the supplies (program office) prepared a purchase request. This form required review and signature by an authorized requesting official in the program office. The purchase request then traveled to the finance office for certification that the appropriate type and amount of funds were available. Once all required approvals were obtained and funding was certified, the purchase request arrived in the contracting office. A contracting officer would then purchase the product for the end user. This inefficient centralized purchasing process for all supplies and services often took weeks, even months, before employees received the ordered items.<sup>211</sup>

As the private sector recognized long ago, charge cards offer convenience and speed, particularly when compared to the Government's purchase order system. The government purchase card eliminates most of the steps involved in the purchase order system. In actual practice, end users in program offices can now visit or call a nearby commercial office supply store (or visit its Internet-based online store), choose from a nearly unlimited range of product options, charge the purchase, and promptly return (or arrange for prompt delivery) with items such as copy paper,

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<sup>210</sup> GSA Office of Intergovernmental Solutions, *Use of Charge Cards in Federal Government—A Great Success Story* (visited July 17, 2000)  
<<http://policyworks.gov/org/main/mg/intergov/PC-Frontpg.htm>>.

<sup>211</sup> GSA Office of Intergovernmental Solutions, *Use of Charge Cards in Federal Government—A Great Success Story* (visited July 17, 2000)  
<<http://policyworks.gov/org/main/mg/intergov/PC-Frontpg.htm>>, see also AIR FORCE LOGISTICS MANAGEMENT AGENCY, ANALYSIS OF EFFECTS OF INTERNATIONAL MERCHANT PURCHASE AUTHORIZATION CARD USAGE, AFLMA Final Report LC962202, at 9-13, 25 (1997) (describing purchase order process).

office furniture, personal computers, software, or peripherals. "Whereas repetitive small purchases were eating up time and adding no value, the new purchase cards provided 'on the spot' purchasing and receiving, eliminating two to six weeks of paperwork."<sup>212</sup> Quite simply, the purchase card provides the end user with immediate gratification and high customer satisfaction.

From a policy standpoint, the driving justifications for the purchase card lie in reduced administrative procurement and payment costs, coupled with speed and convenience.<sup>213</sup> The majority of cost reductions achieved through use of the purchase card result from a streamlining of the acquisition process.<sup>214</sup>

Several studies have shown this move reduced the labor and payment processing costs for those purchases by eliminating steps from the procurement process and consolidating bills for many purchases into one payment. One interagency study showed that costs were often cut by more than half. Several agencies in our review identified millions of dollars in current or potential savings from using purchase cards.<sup>215</sup>

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<sup>212</sup> GSA Office of Intergovernmental Solutions, *Use of Charge Cards in Federal Government—A Great Success Story* (visited July 17, 2000) <<http://policyworks.gov/org/main/mg/intergov/PC-Frontpg.htm>>.

<sup>213</sup> Gen. Acct. Off., *Aquisition Reform Purchase Card Use Cuts Procurement Costs, Improves Efficiency*, Rept. No. GAO/NSIAD-96-138, at 2 (1996).

<sup>214</sup> Department of Defense Inspector General, *Audit Report: Use of the International Merchant Purchase Card Authorization Card 3* (1999) <<http://www.dodig.osd.mil/audit/reports/99-129.pdf>>.

<sup>215</sup> Gen. Acct. Off., *Aquisition Reform Purchase Card Use Cuts Procurement Costs, Improves Efficiency*, Rept. No. GAO/NSIAD-96-138, at 3 (1996).

GSA calculates that for each purchase card transaction, across the government an average of \$53.77 in administrative savings are achieved.<sup>216</sup> Program savings, through FY 99, total \$1.1 billion.<sup>217</sup>

### B. Labor Savings & Procurement Downsizing

In terms of procurement, as Congress continues the downsizing of the federal acquisition workforce, government agencies increasingly rely on purchase cards for labor savings (or increased administrative efficiency) and workload shifting (i.e., opportunities for non-acquisition personnel to buy for the Government). From 1994-1999, government agencies struggled with personnel staff reductions required by the Federal Workforce Restructuring Act of 1994, which reduced government staff by over 200,000 personnel.<sup>218</sup> The National Defense Authorization Act for FY 2000 mandates further reductions in the “defense acquisition and support workforce”

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<sup>216</sup> GSA SmartPay 1999 Executive Summary (visited July 17, 2000) <<http://www.fss.gov/services/gsa-smartpay/execsum.pdf>>. The Army calculated its administrative savings for each purchase card transaction as \$93, Deputy Assistance Secretary of the Army (Financial Operations), *Government Purchase Card Program Audit Program* (visited July 17, 2000) <<http://www.asafm.army.mil/ir/irinfo/gpcp.htm>>, while the Air Force calculated its administrative savings for each purchase card transaction as \$15, AIR FORCE LOGISTICS MANAGEMENT AGENCY, ANALYSIS OF EFFECTS OF INTERNATIONAL MERCHANT PURCHASE AUTHORIZATION CARD USAGE, AFLMA Final Report LC962202, at 9-13, 25 (1997), and the Navy’s figure is \$114. *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Gen. Acct. Off., *Acquisition Reform Purchase Card Use Cuts Procurement Costs, Improves Efficiency*, Rept. No. GAO/NSIAD-96-138, at 3 (1996); Pub. L. No. 103-226, § 5(b), 108 Stat. 111, 116 (1994).

for FY 2000.<sup>219</sup> The cumulative effect of labor savings or workload shifting permitted by purchase cards helps lessen the impact of a decade of government staff reductions, especially in procurement offices.<sup>220</sup>

### C. Payment Consolidation and Shift of the Accounting Workload to the Private Sector

The purchase card also reduces the number of invoices that the Government must process for payment, which in turn generates significant efficiencies (in disbursing funds) and corresponding savings. With traditional contracting methods, the Government processes at least one invoice for each purchase. Under the purchase card program, instead of vendors receiving direct payment from the government, the purchase card contractor makes the payments to the Government's vendors. The card vendor then aggregates the transactions and sends a consolidated invoice to the government agency. This allows the agency to process one invoice for

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<sup>219</sup> Pub. L. No. 106-65, § 922, 113 Stat. 512, 724 (1999). Moreover, Congress required that the Secretary of Defense submit a report specifying the "total number of personnel the Secretary expects to reduce from the defense acquisition and support workforce" during 2000, plus the reduction programmed into the President's 2001 budget. *Id.* See *Dateline November 1999*, 13 Nash & Cibinic Report 1 (Nov. 1999) (the Department of Defense reports a 55 percent reduction in the acquisition workforce from Fiscal Year 1989 to 2001). There remains sentiment in Congress to impose further reductions in the defense acquisition workforce in 2001, H.R. 4206 (Placed on Calendar in Senate), National Defense Authorization Act for Fiscal Year 2001, § 902, 106th Cong. (2000), as well as opposition to further cuts, H.R. 4206 (Engrossed Senate Amendment), National Defense Authorization Act for Fiscal Year 2001, § 812, 106th Cong. (2000).

<sup>220</sup> Gen. Acct. Off., *Acquisition Reform Purchase Card Use Cuts Procurement Costs, Improves Efficiency*, Rept. No. GAO/NSIAD-96-138, at 6 (1996).

multiple purchase card transactions. This administrative payment efficiency significantly reduces the Government's finance and accounting operating costs.<sup>221</sup>

More specifically, use of the purchase card *prioritizes* much of the Government's processing and payment burden. As described above, card vendors—commercial banks—dramatically reduce the number of invoices and payments the Government must process. At the same time, card vendors ensure that contractors receive payment on a timely basis, avoiding (to a great extent) problems associated with the Prompt Payment Act.<sup>222</sup> The private sector—the businesses that sell to the Government—pay the card vendor for these services through card transaction fees (typically based upon the value of the transaction).<sup>223</sup>

#### **D. Rebates**

In addition to the administrative, labor, and time savings provided by purchase cards, purchase card usage also generates rebates or refunds to purchasing agencies. Just as individuals earn cash rebates or frequent flyer miles for credit card usage, the Government has become accustomed to receiving rebates and, accordingly, has

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<sup>221</sup> Department of Defense Inspector General, *Audit Report: Use of the International Merchant Purchase Card Authorization Card 1* (1999)  
<<http://www.dodig.osd.mil/audit/reports/99-129.pdf>>.

<sup>222</sup> 31 U.S.C. § 3901 *et seq.*; *see generally* FAR Subpart 32.9—Prompt Payment.

<sup>223</sup> In today's economy, sellers of commercial goods and services routinely set (e.g., inflate) their prices to absorb card transaction fees. Few contemporary commercial vendors continue to eschew charge card transactions. Even fewer continue to offer separate prices distinguishing customers purchasing by cash (or check) from those using a charge card.

negotiated refunds into the SmartPay contract.<sup>224</sup> Refunds vary based on the specific terms of the agency-card vendor task order and depend, among other things, upon individual agencies' purchase volume (sales refund) and history of timely payment to the card vendor (productivity refund).<sup>225</sup> For the sales refund (six percent of net volume), generally, GSA gets four percent and the agency receives two percent of sales volume.<sup>226</sup> There is no standard rate for productivity refunds.<sup>227</sup>

The Department of Veterans Affairs, one of the Government's most frequent purchase card users, touts that it earned more than \$7 million in refunds in FY 98.<sup>228</sup> The much larger Defense Department reaped \$20 million in rebates during FY 99 and suggests that its annual rebates could soon rise to \$40 million.<sup>229</sup>

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<sup>224</sup> SmartPay Contract, supra note 91, at 9-11.

<sup>225</sup> SmartPay Contract, supra note 91, at 9-11; Office of Management and Budget, *Electronic Purchasing and Payment in the Federal Government, Annual Report to Congress* 23 (1999) <<http://policyworks.gov/org/main/me/epic/ecreport.pdf>>.

<sup>226</sup> SmartPay Contract, supra note 91, at 9.

<sup>227</sup> SmartPay Contract, supra note 91, at 11.

<sup>228</sup> Office of Management and Budget, *Electronic Purchasing and Payment in the Federal Government, Annual Report to Congress* 23 (1999) <<http://policyworks.gov/org/main/me/epic/ecreport.pdf>>.

<sup>229</sup> Purchase Card Program Management Office Presentation to Deputy Defense Secretary (Feb. 4, 2000) <[http://purchasecard.sarda.army.mil/FY99\\_read\\_ahead1.doc](http://purchasecard.sarda.army.mil/FY99_read_ahead1.doc)> (rebates increase with increases in sales volume or speed of payment; as DoD shortens the payment cycle "the rebate has a potential to double from its current \$20 million").

## VI. OVERLOOKED COSTS OF THE PURCHASE CARD PROGRAM

Certain benefits of the purchase card program appear intuitively obvious. End users enjoy virtually unlimited vendor and product choices, while government agencies reap administrative efficiencies in terms of labor savings, transaction speed, reduced accounting costs, improved customer satisfaction, plus rebates. The costs of the program are less obvious. The true cost of the purchase card program is difficult to quantify because the Government tracks and reports only very limited data regarding purchase card use. The Government does not incorporate comprehensive purchase card data into the annual Federal Procurement Report data analysis, but instead provides only a one-page summary of overall purchase card data.<sup>230</sup> The factors which make the purchase card so appealing (administrative efficiency, transaction speed, end user choice), however, dilute a host of traditional and important Government programs and policies, such as fostering small businesses, overcoming regional unemployment, and mandating purchases from the industries employing the blind and disabled. Moreover, increased and unfettered purchase card usage potentially inflicts damage upon at least three core principles at the foundation of the United States Government procurement system: competition, transparency, and integrity.<sup>231</sup>

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<sup>230</sup> See discussion *infra* Part VI.C.1.

<sup>231</sup> For additional discussion of the three pillars of the public procurement system, see Steven L. Schooner, *Pondering the Decline of Federal Government Contract Litigation in the United States*, 8 PUB. PROC. L. REV. 242, 248 (1999); James J. Myers, *The New UNCITRAL Model Law on Procurement*, 23 PUB. CONT. L.J. 267, 268 (1994).

### A. Efficiency at any Price?

The combination of workload shifting and labor savings discussed above bears emphasis and analysis. Purchase cards permit personnel *other than contracting officers* to procure goods and services. Far less—in terms of experience, knowledge, and effort—is required of these non-procurement personnel when using the purchase card (some of who spend over \$60,000 in taxpayer funds annually).<sup>232</sup> FASA exempted micro-purchases from only three of the multitudinous government procurement restrictions—domestic preferences,<sup>233</sup> the small business reservation,<sup>234</sup> and the competition requirement.<sup>235</sup> To the extent that a government buyer armed with a purchase card can shop at his or her preferred retail establishment, the end user, rather than a contracting officer, may choose items unfettered by applicable government procurement policies such as those relating to price, environmentally friendly products, blind or severely disabled labor, and prison industries.<sup>236</sup> Without

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<sup>232</sup> See *supra* text accompanying notes 73-74.

<sup>233</sup> FASA, Pub. L. No. 103-355, § 4301; 41 U.S.C. § 428(b); see Buy American Act, 41 U.S.C. §§ 10a-10d (generally requiring that only domestic end products be procured in supply and construction contracts); Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2582 (exemptions to the Buy American Act for countries that provide reciprocal government acquisition opportunities for American businesses; Balance of Payments Program, FAR Subpart 25.3 (giving preference to American products acquisitions taking place outside of the United States); see also NASH, SCHOONER & O'BRIEN, *supra* note 90, at 53, 75, 519.

<sup>234</sup> FASA, Pub. L. No. 103-355, § 4301; 41 U.S.C. § 428(b); see generally Steven L. Schooner, *Mixed Messages: Heightened Complexity in Social Policies Favouring Small Business Interests*, 8 PUB. PROC. L. REV. CS78, CS79 (1999).

<sup>235</sup> FASA, Pub. L. No. 103-355, § 4301; 41 U.S.C. § 428(c).

<sup>236</sup> See discussion *supra* Parts IV.C.1-IV.C.11.

public study, analysis, and debate of these issues, it would seem that the Government is willing to pay any price for the efficiencies offered by the purchase card program. Thus, now is the time to analyze the true cost and impact of the purchase card program so that adjustments can be made, if necessary, to effectuate important government procurement policies and goals other than efficiency for efficiency's sake for "the protection of the public fisc is a matter that is of interest to every citizen."<sup>237</sup>

### **B. Transfer of Payment Function for Rebates**

For most agencies, rebates from the SmartPay program represent newly discovered money. While the rebates appear sizeable—\$55 million in FY 99 (this figure includes rebates for purchase cards as well as travel and fleet cards under the SmartPay contract),<sup>238</sup> no one suggests that rebates rival the savings in government labor associated with the transfer of the Government's payment function to the private sector. GSA calculates that the purchase card program has saved the Government \$1.1 billion.<sup>239</sup> While the Government is quick to calculate the savings of the purchase card program, the lack of Government collection and public reporting of meaningful data for the purchase card program use makes it difficult, if not impossible, to calculate the costs of the program for comparison to the reported savings.

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<sup>237</sup> *Brock v Pierce County*, 476 U.S. 253, 262 (1986).

<sup>238</sup> GSA SmartPay 1999 Executive Summary (visited July 17, 2000) <<http://www.fss.gov/services/gsa-smartpay/execsum.pdf>>.

<sup>239</sup> GSA SmartPay 1999 Executive Summary (visited July 17, 2000) <<http://www.fss.gov/services/gsa-smartpay/execsum.pdf>>.

As discussed above, the government contractor initially pays for both the rebates and the purchase card provider's services through the transaction fees paid to banks for the privilege of accepting charge cards for payment. As is the case with commercial open-market transactions, acceptance of the purchase card by government contractors requires sacrifice of a percentage of their receipts to their bank as a charge card transaction fee.<sup>240</sup> While the Government indicates that there are no additional costs for contractors that already accept commercial credit cards, this overlooks the fact that acceptance of the purchase card—in lieu of traditional government payment methods such as checks or, more recently, electronic funds transfer—reduces the amount of the payment received by the contractor. As suggested above, most reasonably prudent sellers of commercial goods and services routinely set (e.g., inflate) their prices to absorb card transaction fees.<sup>241</sup>

This new government purchasing regime shifted much of the government payment function to the private sector. The Government credits this shifting of workload to the private sector as alleviating the burdens placed on contracting offices, “allowing them to focus their reduced staff resources on more complex high-value procurements where their expertise adds the greatest value to the buying

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<sup>240</sup> GSA SmartPay Program Flyer (visited July 17, 2000)  
<<http://pub.fss.gsa.gov/services/gsa-smartpay/fm/pdf/smartpay.pdf>>.

<sup>241</sup> See *supra* note 223.

process.”<sup>242</sup> While the Government is quick to calculate the savings from this workload shift to the private sector, it seems to ignore that the logical result of shifting the financial burden of the government payment function to the private sector is an increase in prices paid by the Government. Even a small percentage increase (e.g., one percent) in the prices charged to the Government in micro-purchase transactions dwarfs the amount of the rebates paid to the Government by the purchase card vendors. Thus, the touted government savings earned through the purchase card program could be a false economy that, in the end, costs the taxpayers more of their hard-earned dollars through higher prices triggered by the government purchase card program. The difficulty, as described in the next section, is that the lack of transparency in the purchase card program precludes meaningful inquiry into this issue.

### C. Harm to the Government Procurement System

Without transparency, integrity, and competition, public confidence in the government procurement system diminishes.<sup>243</sup>

Ensuring open and effective competition when undertaking purchasing helps public authorities to achieve value for money purchases, while also providing suppliers with equal access to government business opportunities. Open and effective competition provides many benefits,

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<sup>242</sup> Office of Management and Budget, *Electronic Purchasing and Payment in the Federal Government, Annual Report to Congress* 23 (1999) <<http://policyworks.gov/org/main/me/epic/ereport.pdf>>.

<sup>243</sup> See James J. Myers, *The New UNCITRAL Model Law on Procurement*, 23 PUB. CONT. L.J. 267, 268 (1994).

including innovation, efficiency and choice, and clearly illustrates the transparency and integrity of government purchasing.<sup>244</sup>

At a certain point, taxpayers become indignant, and Congress is often forced to respond by imposing increased oversight and regulation of an admittedly over-regulated process.<sup>245</sup> Thus, it is important to maintain these pillars of the procurement system. Unfortunately, the purchase card program has inflicted harm on these fundamental principles.

### *1. Transparency*

While the U.S. procurement system generally serves as a model of transparency,<sup>246</sup> the purchase card program is a significant exception. Each year, the GSA Federal Procurement Data Center issues a publicly available, comprehensive report detailing all federal contracting actions.<sup>247</sup> This report examines various

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<sup>244</sup> Western Australia State Supply Commission, *Policies and Guidelines Manual* (visited July 17, 2000) <[http://www.ssc.wa.gov.au/pol\\_guide/policies/competition.html](http://www.ssc.wa.gov.au/pol_guide/policies/competition.html)>.

<sup>245</sup> WILLIAM H. GREGORY, THE DEFENSE PROCUREMENT MESS 171-89 (1989).

<sup>246</sup> In addition to the data services described below, the U.S. Federal Government procurement system maintains transparency in many ways, including, but not limited to: publishing the statutes, regulations (see, e.g., <<http://www.acnet.gov/far>>), and rules that define the process; publicizing requirements in print and on the Internet in the Commerce Business Daily (CBD) (see, e.g., <<http://cbdnet.gpo.gov>>); articulating clearly in every solicitation how offerors will be evaluated; debriefing unsuccessful offerors; providing for “protest” or “disappointed offeror” procedures; and employing appropriate oversight, such as government Inspectors General, to periodically audit agency actions.

<sup>247</sup> The Federal Procurement Data System (FPDS) provides statistical data about federal executive branch procurement transactions as of the time of contract award or inception. 41 U.S.C. §§ 405(d)(4)(A), 417 (mandating establishment of an automated system for collection, evaluation, and dissemination of information on Federal procurement contracts); *see also* FAR 4.602 (outlining FPDS requirements). The FPDS is available online (visited July 17, 2000) <<http://fpds.gsa.gov>>. The

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aspects of the federal procurement process and includes data useful for analysis of geographical, market, and socioeconomic impacts of federal contracting actions. Purchase card acquisitions, however, remain practically invisible to the Federal Procurement Data System (FPDS).

The FPDS reporting requirements distinguish between the record-keeping burdens required of larger and smaller buys. Agencies report each purchase over \$25,000 individually, on a Standard Form (SF) 279, Individual Contract Action Report.<sup>248</sup> Conversely, agencies collect and report purchases under \$25,000 as a group on a periodic basis, either annually or quarterly. Agencies comply with the aggregated reporting requirements for smaller purchases using the SF 281, Summary Contract Action Report.<sup>249</sup> For all purchases below \$25,000, *excluding micro-purchase*

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FPDS collects and publicly reports statistical procurement transaction data from approximately 65 U.S. Government, Executive Branch, departments, bureaus, agencies, and commissions. The following organizations do not report data under the FPDS: U.S. Postal Service, legislative branch organizations (Congress, Architect of the Capital, Government Printing Office, General Accounting Office, etc.) and judicial branch organizations (U.S. Courts).

<sup>248</sup> The Standard Form 279 captures approximately forty units of information including: action date, kind of contract action, dollars obligated, principal industrial classification, contractor's name, place of performance, solicitation procedures, number of offers received, type of contractor, and size of small business. FAR 4.601, 53.301-279. In FY 98, agencies submitted SF 279 data for 487,264 individual actions. GSA FEDERAL PROCUREMENT DATA CENTER, FY 99 FEDERAL PROCUREMENT REPORT 4 (2000). "DoD uses the DD Form 350, Individual Contracting Action Report, instead of the SF 279, Federal Procurement Data System (FPDS) Individual Contract Action Report." DFARS 204.602(c).

<sup>249</sup> FAR 4.601, 53.301-281. In FY 99, agencies submitted SF 281 data for 9,982,894 million contractual actions. GSA FEDERAL PROCUREMENT DATA CENTER, FY 99 FEDERAL PROCUREMENT REPORT 4 (2000). "DoD uses the DD Form 1057,

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*transactions made with the purchase card*, the summary report requires agencies to: (1) disclose the number of contract actions and the net dollars obligated, (2) indicate the number of actions by procurement methods— e.g., how many actions were competitive, how many were not; (3) calculate the number of dollars received by small businesses, received by large businesses, or spent outside of the United States; and (4) identify the number of actions and net dollars involving firms covered by certain social or economic policies— e.g., small businesses, small disadvantaged businesses, 8(a) firms,<sup>250</sup> women-owned small businesses, JWOD non-profit agencies,<sup>251</sup> historically black colleges or universities, or minority institutions.<sup>252</sup>

Agencies are not required to report purchase card transaction data under the Federal Procurement Data System.<sup>253</sup> The only information relating to purchase card acquisitions provided in the FY 99 Federal Procurement Report is the total number of purchase card transactions, the total dollar value of all purchase card transactions,

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Monthly Summary of Contracting Actions, instead of the SF 281, FPDS Summary Contract Action Report (\$25,000 or Less).” DFARS 204.602(c).

<sup>250</sup> 15 U.S.C. § 637(a); FAR 19.801.

<sup>251</sup> See generally JWOD website (visited July 12, 2000) <<http://www.jwod.com>> (explaining that JWOD “products are manufactured by non-profit agencies throughout the United States that employ people who are blind or have other severe disabilities”).

<sup>252</sup> See FAR Subpart 26.3— Historically Black Colleges and Universities and Minority Institutions.

<sup>253</sup> See, e.g., DFARS 204.670-2(c)(1) (“Do not report the following types of contracting actions on either the DD Form 350 or DD Form 1057: (1) Imprest fund (continued ...) ”).

and the number of cards issued (broken down by agency).<sup>254</sup> As a result, agencies may ignore their purchase card transactions when reporting their efforts to comply with statutory social contracting goals.<sup>255</sup> Further, purchase card data is not included in any of the other data in the annual Federal Procurement Report.<sup>256</sup>

Despite the purchase card's ever-increasing role in government procurement, as evidenced by the program's accounting for two-thirds of all government procurement actions and the program's inexorable march toward ten percent of the federal procurement budget, these transactions have not obtained appropriate visibility. When the public loses sight of how the government spends taxpayer funds, the system suffers.<sup>257</sup> This lack of public access to purchase card data interferes with more than the public's right to know how the Government spends taxpayer funds. It also harms those who desire to compete for the Government's business. Purchase

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transactions, SF 44 purchases, and *micro-purchases obtained through use of the Governmentwide commercial purchase card.*") (emphasis added).

<sup>254</sup> GSA FEDERAL PROCUREMENT DATA CENTER, FY 99 FEDERAL PROCUREMENT REPORT 13 (2000).

<sup>255</sup> For example, Congressionally-mandated goals (based upon dollars, not contracting actions) include: small business (23 percent), small disadvantaged business (5 percent), women-owned business (5 percent), and Historically Underutilized Business Concerns (phased-in goal of 3 percent). See OFPP Policy Letter 99-1, *Small Business Procurement Goals* (Nov. 8, 1999) <<http://www.arnet.gov/Library/OFPP/PolicyLetters/Letters/PL99-1.html>>, FAR Part 19— Small Business Programs.

<sup>256</sup> *Id.*

<sup>257</sup> Steven L. Schooner, *Pondering the Decline of Federal Government Contract Litigation in the United States*, 8 PUB. PROC. L. REV. 242, 248 (1999).

card acquisitions made under micro-purchase authority are advertised in neither the print nor the Internet versions of the Commerce Business Daily.<sup>258</sup> Nor are the prospective purchases posted on public bulletin boards; nor do procuring offices mail notices of these buys to prospective contractors.<sup>259</sup> There is no public notice requirement for micro-purchases. A cardholder visiting a local office supply store may see a useful product and decide, on the spot, that his or her agency needs that product. Without more, the cardholder may purchase the product with the government purchase card. This, in essence, is an unfettered sole source procurement insulated from public scrutiny. While the value of each individual purchase may be (relatively) small, the volume of such purchases is high (two-thirds of all government contracting actions), with continued exponential growth forecasted.<sup>260</sup>

This lack of transparency in the purchase card program also impairs the Government's ability to monitor and properly supervise purchase card use. For example, in *Jay Automotive Specialties*,<sup>261</sup> a government contractor entered into a

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<sup>258</sup> FAR 5.101(a)(1). The Commerce Business Daily is available online at the CBDNet website (visited July 17, 2000) <<http://cbdnet.gpo.gov>> (“CBDNet is the Government's official free electronic version of the Commerce Business Daily”).

<sup>259</sup> FAR 5.101(a)(2).

<sup>260</sup> See discussion *supra* Part II.F.

<sup>261</sup> ASBCA No. 50036, 99-1 BCA ¶ 30,186 (1998).

requirements contract<sup>262</sup> for a contractor operated parts store. The Government then used purchase cards to procure auto parts on the retail market that should have been purchased through the requirements contract.<sup>263</sup> The Board of Contract Appeals held that the Army's use of the purchase card to commercially procure auto parts that should have been purchased through the requirements contract was a partial constructive termination for convenience<sup>264</sup> of the requirements contract.<sup>265</sup> Neither party was able to calculate precisely the total amount of revenue improperly diverted from the requirements contract, because the Government's *purchase card records lacked information on what items were purchased* in each transaction.<sup>266</sup> The contracting officer asserted, and the Board of Contract Appeals agreed, that it was impractical to determine the amount of improper acquisitions from purchase card records because of the imprecise nature of the Government's records. The Board's only option was to estimate the contractor's damages by relying on a reduction in the contractor's revenue stream *presumably* caused by the improper purchase card acquisitions.<sup>267</sup>

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<sup>262</sup> "A requirements contract provides for filling all actual purchase requirements of designated Government activities for supplies or services during a specified contract period, with deliveries or performance to be scheduled by placing orders with the contractor." FAR 16.503(a) (emphasis added).

<sup>263</sup> ASBCA No. 50036, 99-1 BCA ¶ 30,186 (1998).

<sup>264</sup> The Government generally enjoys a right to "terminate or cancel performance or work under a contract, in whole or in part." NASH, SCHOONER & O'BRIEN, *supra* note 90, at 512; *see also* FAR Part 49—Termination of Contracts.

<sup>265</sup> ASBCA No. 50036, 99-1 BCA ¶ 30,186 (1998).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

Furthermore, this lack of transparency denies policymakers access to important information that would give great insight into the impact of the purchase card program on traditional and important government procurement policies. Such information would also allow the government to leverage its purchasing power into better pricing agreements for the government. Concatenated government-wide purchasing data could prove to be a powerful negotiating tool and potentially lead to savings that would enhance, rather than diminish, the purchase card's efficiency and utility.

Commercially available technology permits large-scale sorting of purchase card transactions, in the same manner in which certain premium credit card vendors organize and report annual purchases for their customers. Such spending data would indicate that, in a given year, the 517,000 government purchase cardholders buy a significant amount of product from any number of large, international, national, or regional office supply (or other) retailers. Just as the U.S. Government, through GSA, negotiates with domestic airlines to obtain dramatic discounts and benefits (specifically, the flexibility to change travel plans without penalty), GSA has only recently begun negotiating across-the-board discounts for purchases made with the government purchase card.<sup>268</sup>

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<sup>268</sup> GSA SmartPay website (visited July 17, 2000)  
<<http://www.fss.gsa.gov/services/gsa-smartpay/pos.doc>>.

Detailed purchase card data is provided to the Government under the SmartPay contract. Purchase card vendors are required to provide the following data to the Government (fleet and travel card data requirements omitted):<sup>269</sup>

**User Data**

- a) Account name/Equipment ID name
- b) Account number
- c) Agency/organization name
- d) Agency/organization identifying number

**Merchant Data**

- a) Merchant category code
- b) Merchant/Station name
- ...
- e) Merchant/Station city;
- f) Merchant/Station state;
- g) Merchant zip
- ...
- i) Merchant/Station TIN
- j) Merchant/Station telephone
- k) Merchant/Station 1057 data-minority, women-owned business codes
- l) Merchant/Station 1099 data
- m) Merchant/Station DUNs

**Transaction Processing Data**

- a) Debit or credit indicator
- b) Date of charge/credit (and identify ATM, travelers check, or convenience check transaction)
- ...
- d) Posting date
- e) Contractor processing/transaction reference number for each charge/credit

**Product/Service Data**

- a) Product/Service/Repair code
- ...
- h) Amount of charge/credit (and identify ATM, travelers check or convenience check transaction)
- i) Product/Service/Repair descriptions (line item detail)
- ...
- l) Unit of measure
- ...
- n) Unit cost
- ...
- p) Quantity
- ...

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<sup>269</sup> SmartPay Contract, *supra* note 91, at 157.

- r) Sales tax amount
- ...
- bb) Discount amount

**Shipment/Order Data**

- a) Ship to/from zip codes
- b) Freight amount
- c) Duty amount
- d) Accounting code
- e) Order date
- f) Order number

Moreover, purchase card vendors makes must offer all such information to the Government in *electronic* format.<sup>270</sup> This electronic data could easily be incorporated into the FPDS reports, especially the procurement preference goaling achievement reports.

The lack of integration of purchase card data into the annual Federal Procurement Report harms the government procurement system in many ways. First, this data black hole in the annual Federal Procurement Report skews the entire report. The FPDS table indicating that in FY 99 the federal government obligated \$198.75 billion in 10.47 million contracting actions is incorrect because these figure omit purchase card transactions— \$10.19 billion in 20.63 million contracting actions.<sup>271</sup> Second, this data omission casts a shadow on the Government's goaling preference figures. The Government reported that it met its goal of awarding twenty-three percent of all federal contracting dollars to small businesses.<sup>272</sup> If

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<sup>270</sup> SmartPay Contract, *supra* note 91, at 154-157.

<sup>271</sup> GSA FEDERAL PROCUREMENT DATA CENTER, FY 99 FEDERAL PROCUREMENT REPORT viii, 13 (2000) (reporting a 23.14% award rate to small business— based on dollars awarded).

<sup>272</sup> *Id.* at viii.

purchase card data were included in the annual Federal Procurement Report, the result would likely be different, considering the large-business retail spending behavior that the purchase card program not only encourages, but facilitates as well.<sup>273</sup>

The benefits from broader public reporting of purchase card data far outweigh the minimal administrative/technical burden associated with including purchase card data in the FPDS reporting system. This is especially true given the new SmartPay contract's electronic data submission requirements.

## 2. *Integrity*

Integrity is the hallmark of the U.S. procurement system.<sup>274</sup> Innumerable laws and regulations attempt to ensure not only a lack of impropriety in the procurement process, but also a lack of any *appearance* of impropriety.<sup>275</sup> While the Government trusts and expects its employees and contractors to maintain the highest ethical standards, the Government also normally ensures such integrity in procurement

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<sup>273</sup> In other words, if purchase card data were publicly available, government purchasing behavior would most likely change (e.g., less purchases at large retail office supply stores in favor of JWOD program purchases). See discussion *supra* Parts V.A, VI.A.

<sup>274</sup> Steven L. Schooner, *Pondering the Decline of Federal Government Contract Litigation in the United States*, 8 PUB. PROC. L. REV. 242, 248 (1999).

<sup>275</sup> E.g., Office of Federal Procurement Policy Act Amendments of 1988 (also known as the Procurement Integrity Act), Pub. L. No. 100-679, § 6, 102 Stat. 4055, 4063 (1988) (establishing standards of conduct for Federal employees and government contractors involved in the Federal procurement process) (codified at 41 U.S.C. § 423); FAR Part 3—Improper Business Practices and Personal Conflicts of Interest.

through an extensive system of professional development and training as well as an elaborate system of checks and balances.<sup>276</sup>

Purchase card transactions, however, bypass most controls applicable to other government procurements. As noted above, micro-purchases are exempt from, *inter alia*, the general competition requirement, domestic preference provisions, and small business preferences. In addition, no price reasonableness verification is required unless the cardholder suspects that the price is unreasonable.<sup>277</sup>

Yet, in the context of maintaining compliance with existing law and policy, the card program's most troubling feature derives from its exception to the general rule that *only duly trained and appointed contracting officers* can bind the Government in contract. Under the purchase card program, program office personnel are authorized to make government acquisitions.<sup>278</sup> In other words, the end users are the shoppers.<sup>279</sup> In many agencies, these cardholders receive as little as three or four

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<sup>276</sup> See FAR Subpart 1.6— Career Development, Contracting Authority, and Responsibilities; Office of Federal Procurement Policy, Policy Letter 97-01— Procurement System Education, Training and Experience Requirements for Acquisition Personnel (Sept. 12, 1997) <<http://www.arnet.gov/Library/OPPP/PolicyLetters/Letters/PL97-01.html>>.

<sup>277</sup> FAR 13.202(a)(2), (a)(3).

<sup>278</sup> FAR 1.603-3(b), 2.101.

<sup>279</sup> Compare FAR 1.603-3(a) (mandating that contracting officers be appointed in writing using a Certificate of Appointment, the Standard Form 1402, FAR 53.301-1402, with stated limitations on each individual's scope of authority) with FAR 1.603-3(b) (encouraging agency heads to delegate micro-purchase authority to individuals who will be using the supplies or services being purchased). See also FAR 13.201(a) (“Agency heads are encouraged to delegate micro-purchase authority”); FAR

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hours of training before entering the retail market to buy for the Government (some thereafter spending over \$60,000 per year).<sup>280</sup> Unlike restrictions placed on contracting officers, non-procurement cardholders are not required to ensure that before entering into a contract, all legal requirements have been met, or that contractors receive fair, impartial, and equitable treatment.<sup>281</sup> Nor do the regulations suggest that cardholders, like contracting officers, “should be allowed wide latitude to exercise business judgment.”<sup>282</sup> Nonetheless, purchase cardholders enjoy almost unfettered discretion in selecting vendors, products, or services.

For all of its strengths, the government procurement system is exceedingly complex. It is safe to assume that most cardholders are not conversant with the full panoply of policies and goals implicated by the procurement system. It would be unreasonably idealistic to assume that these end user/shoppers routinely endeavor to

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13.201(b) (“The Governmentwide commercial purchase card shall be the preferred method to purchase and to pay for micro-purchases”).

<sup>280</sup> E.g., USAF Internal Procedures For Using The IMPAC ¶ 5.3.3.3.1 (visited July 17, 2000) <[http://www.safaq.hq.af.mil/contracting/toolkit/impac/im\\_guide.html](http://www.safaq.hq.af.mil/contracting/toolkit/impac/im_guide.html)>; Defense Service Supply-Washington Purchase Card Training Handout 5 (1999) (on file with author). NASA’s purchase card regulations do not specify a minimum amount of training, but instead requires “training adequate to ensure appropriate use of the purchase card.” 48 C.F.R. § 1813.301(a)(i).

<sup>281</sup> FAR 1.602-2.

<sup>282</sup> See FAR 1.601 (explaining that: (1) authority and responsibility to contract is vested in the agency head; (2) the agency head may establish contracting activities and delegate broad authority to the heads of such contracting activities; and (3) contracts may be entered into and signed on behalf of the Government only by contracting officers). Further, the responsibility to ensure that legal requirements are met or that contractors receive fair treatment resides with the contracting officer. FAR 1.602-2.

equitably distribute purchases among qualified suppliers and assiduously purchase products from required sources (such as blind or severely disabled workshops or prison industries) before seeking readily-available name-brand goods in the commercial or retail marketplace.

The ubiquitous government pen is an illuminating example. Once commonplace in government offices, they are now eschewed in favor of more expensive imported pens purchased in retail stores. Absent unusual and compelling urgencies, such retail purchases violate the FAR Part 8 required sources rule.<sup>283</sup> While government purchases of writing instruments may seem minor, it sheds light on government purchase card spending habits. Comprehensive purchase card statistics reflecting retail store volume would prove enlightening on this issue. However, GSA's failure to incorporate purchase card data into the FPDS prevents any such insight or public analysis of the Government's purchase card spending behavior. The absence of a credible oversight mechanism or public reporting requirement raises significant concerns regarding public trust and the integrity of the government procurement system.

Unlike most other government procurements, no bid protest mechanism is available to other parties interested in obtaining the government contract.<sup>284</sup> Bid

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<sup>283</sup> See *supra* Part IV.C.1.

<sup>284</sup> Bid protests are important mechanisms in protecting the American procurement system from improper or illegal actions. Steven L. Schooner, *Pondering the Decline of Federal Government Contract Litigation in the United States*, 8 PUB. PROC. L. REV. 242, 249 (1999). Unfortunately, there are no bid protests for purchase card acquisitions because there is no competition requirement for such acquisitions, FAR 13.202(a)(2),  
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protests provide a valuable public service in that they provide a mechanism to identify and to correct incidents (hopefully rare) of inadvertent or illegal, arbitrary, or capricious agency action.<sup>285</sup> In this context (among others), federal courts coined the term *private attorneys general* to describe protesters, and others, who keep the Government honest by pursuing their own self-interest<sup>286</sup> through “citizen suits.”<sup>287</sup> In the landmark 1970 *Scarrall* decision, the United States Court of Appeals for the District of Columbia Circuit explained that contractors, injured by arbitrary and capricious government actions, sue or protest to “vindicate their very real interests, while at the same time *furthering the public interest.*”<sup>288</sup> To the extent that this control mechanism is *de facto* unavailable for purchase card acquisitions, the Government sacrifices much of its potential for effective and credible oversight.

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and, as described below, these transactions are hidden from public scrutiny. *See also* FAR Subpart 33.1—Protests.

<sup>285</sup> Steven L. Schooner, *Pondering the Decline of Federal Government Contract Litigation in the United States*, 8 PUB. PROC. L. REV. 242, 249 (1999).

<sup>286</sup> See, e.g., *Scarrall Laboratories, Inc. v Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970); Robert A. Anthony, *Zone-Free Standing for Private Attorneys General*, 7 GEO. MASON L. REV. 237 (1999).

<sup>287</sup> See, e.g., *Bennett v Spear*, 520 U.S. 154, 165-66 (1997) (describing a private attorney general provision through which a citizen may bring suit to enjoin governmental action which allegedly violates a certain law).

<sup>288</sup> *Scarrall Laboratories, Inc. v Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970) (emphasis added).

Nor does GAO oversight fill the void. Dubbed by the Supreme Court as the "congressional watchdog of Government expenditures,"<sup>289</sup> the GAO conducted a review of purchase card use in 1996.<sup>290</sup> The GAO report discussed "concerns that placing the card in the hands of program staff would lead to increased abuse."<sup>291</sup> But the GAO found no increased abuse and noted that agencies were required to have financial control mechanisms in place before issuing the cards.<sup>292</sup> However, the GAO looked only at abuses characterized by excessive use. They did not examine or discuss abuses characterized by improper or unauthorized use of the purchase card.<sup>293</sup> This is understandable given that, in 1996, purchase card statistics, other than the

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<sup>289</sup> *S& E Contractors v United States*, 406 U.S. 1, 25 (1972); see also PRINCIPLES OF FEDERAL APPROPRIATION LAW 1-11 to 1-13 (1991) (summarizing GAO's role in the federal fiscal process).

<sup>290</sup> Gen. Acct. Off., *Acquisition Reform Purchase Card Use Cuts Procurement Costs, Improves Efficiency*, Rept. No. GAO/NSIAD-96-138, at 1 (1996).

<sup>291</sup> Gen. Acct. Off., *Acquisition Reform Purchase Card Use Cuts Procurement Costs, Improves Efficiency*, Rept. No. GAO/NSIAD-96-138, at 9 (1996).

<sup>292</sup> Gen. Acct. Off., *Acquisition Reform Purchase Card Use Cuts Procurement Costs, Improves Efficiency*, Rept. No. GAO/NSIAD-96-138, at 9 (1996).

<sup>293</sup> The Army Agency listed the following potential problems to look for in purchase card program audits: credit cards not safeguarded, cardholders not receiving required training, conflicts of interest, inadequate oversight by approving officials, unauthorized purchases, payments made for items not received, split purchases to avoid credit card limitations, purchase of non-expendable pilferable or sensitive items not accounted for on property books, late forwarding of approved copies of the statements to payment office, resulting in interest payment penalties, cardholders' statements approved by someone other than the approving authority, and failure to take advantage of incentives offered for early payment, electronic receipt of invoices, and reports. Deputy Assistance Secretary of the Army (Financial Operations), *Government Purchase Card Program Audit Program* (visited July 17, 2000) <<http://www.asafm.army.mil/ir/irinfo/gpcp.htm>>.

amount and number of transactions, were not available. GAO had no means available to determine whether purchase card acquisitions were for supplies and services appropriate for purchase on the commercial market rather than from other required sources.<sup>294</sup>

Looking to the courts, misuse of the purchase card is easy to find. In *United States v Hurt*,<sup>295</sup> a senior airman in the Air Force used her government purchase card to order a compact disc player by telephone.<sup>296</sup> Shortly thereafter, Hurt learned that she was under investigation for misuse of her government purchase card and she canceled the order, obtaining a credit for the charge.<sup>297</sup> She was charged with dereliction of duty<sup>298</sup> and eight counts of larceny<sup>299</sup>—one of the charges relating to her misuse of her government purchase card to order the compact disc player. Her conviction for misuse of the government purchase card was affirmed on appeal.<sup>300</sup>

A more aggravated case of purchase abuse occurred in *United States v Brown*.<sup>301</sup> Mr. Brown, a retired Army chief warrant officer, operated a military surplus store

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<sup>294</sup> See *infra* text accompanying notes 261-267.

<sup>295</sup> 1999 WL 366709 (A.F. Ct. Crim. App.).

<sup>296</sup> *Id.* at \*1.

<sup>297</sup> *Id.*

<sup>298</sup> Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892.

<sup>299</sup> Article 121, Uniform Code of Military Justice, 20 U.S.C. § 921.

<sup>300</sup> *Id.* at \*2.

<sup>301</sup> 181 F.3d 92 (Table), 1999 WL 357175 (4th Cir. 1999) (unpublished opinion).

near Fort Bragg, North Carolina.<sup>302</sup> Several government employees allowed Mr. Brown to charge their government purchase card for fraudulent transactions (non-existent goods and services).<sup>303</sup> Mr. Brown then shared the proceeds of the fraudulent transactions with the government employee cardholders.<sup>304</sup> The trial court found that the total loss to the government exceeded \$200,000.<sup>305</sup> Mr. Brown pled guilty and was sentenced to 41 months imprisonment.<sup>306</sup> Although the Court of Appeals vacated the sentence and remanded the case for resentencing because the Government breached the plea agreement,<sup>307</sup> Mr. Brown's conviction for purchase card fraud was never in contention.

Obviously, only the more serious cases of purchase card misuse warrant criminal prosecution. Less serious cases of purchase card misuse are handled through administrative actions. The cases discussed above represent only a small percentage of purchase card abuse committed by government employees. Despite the GAO's failure to uncover improper purchase card transactions, the Air Force, in its efforts to improve its purchase card program, has repeatedly found and reported weaknesses in

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<sup>302</sup> *Id.* at \*\*1.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at \*2.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at \*\*6.

purchase card surveillance, administrative controls, authorization procedures, and payment certifications.<sup>308</sup>

Congress recently expressed its concern about purchase card misuse in DoD, the largest user of the government purchase card.<sup>309</sup> In the National Defense Authorization Act for FY 2000, Congress required DoD to enact safeguards and internal controls on government purchase card use.<sup>310</sup> Only time will tell whether the DoD reacts by (1) instituting the minimal amount of oversight necessary to placate Congress and protect the purchase card program's flexibility; or (2) implementing meaningful management controls.

### *3. Competition*

Historically, with the exception of statutorily mandated profit limitations,<sup>311</sup> the maximization of competition served as the primary mechanism to ensure that the

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<sup>308</sup> Report of Audit, International Merchant Purchase Authorization Card, Project 99064007 (2000); Report of Audit, Controls Over the Use of the International Merchant Purchase Authorization Cards, Project 96064011 (1997); Report of Audit, Control Over the Use of International Merchants Purchase Authorization Cards for Small Purchases, Project 93064003 (1994).

<sup>309</sup> In FY 99, DoD accounted for forty-five percent of purchase card dollar volume and forty-four percent of purchase card transactions). GSA FEDERAL PROCUREMENT DATA CENTER, FY 99 FEDERAL PROCUREMENT REPORT 13 (2000).

<sup>310</sup> Pub. L. No. 106-65, § 933, 113 Stat. 512, 728 (1999) (codified at 10 U.S.C. § 2784).

<sup>311</sup> A sampling of the literature discussing profit limitations—ranging from the now-defunct renegotiation statutes to the Truth in Negotiations Act—might include: Ralph C. Nash Jr., *Pricing Policies in Government Contracts*, 29 LAW & CONTEMP. PROBS. 361 (1964); Jeffrey A. Lovitky, *Understanding Causation and Determining the Price Adjustment in Defective Pricing Cases*, 17 PUB. CONT. L.J. 407 (1988). For a broader discussion of profit policy, see William Kovacic & Steven L. Schooner, *A Modest Proposal to Enhance Civil/Military Integration: Rethinking the Renegotiation Regime as a* (continued ... )

Government purchased at reasonable prices.<sup>312</sup> A keystone of maintaining “full and open competition”<sup>313</sup> is ensuring that all interested contractors have no less than a fair opportunity to vie for the Government’s business.<sup>314</sup> Under FASA, however, micro-purchases do not require competitive quotations,<sup>315</sup> nor are they even encouraged. The FAR suggests that: “The administrative cost of verifying the reasonableness of the price for purchases may more than offset potential savings from detecting instances of overpricing.”<sup>316</sup> As discussed above, the regulations suggest only limited scenarios in which purchasers might be inclined to confirm that their micro-purchase prices are, in fact, reasonable.<sup>317</sup> The FAR explains that “action to verify price reasonableness *need only be taken if*<sup>38</sup> the purchaser *suspects* the price is unreasonable or the supply or service being purchased lacks comparative market

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*Regulatory Mechanism To Decriminalize Cost, Pricing, and Profit Policy* (1999) (visited July 17, 2000) <<http://www.law.gwu.edu/facweb/sschooner/DSMC-pricing.pdf>> (paper presented at 1999 Defense Systems Management College Acquisition Research Symposium, June 21-23, 1999).

<sup>312</sup> Competition in Contracting Act, Pub. L. No. 68-369, 98 Stat. 1175 (1984) (codified as amended principally at 41 U.S.C. § 251 *et seq.* and 10 U.S.C. § 2304 *et seq.*) (amending the Federal Property and Administrative Services Act and the Armed Services Procurement Act to require “full and open competition” in most government procurements).

<sup>313</sup> 10 U.S.C. § 2304(a)(1); 41 U.S.C. § 253(a)(1).

<sup>314</sup> *Id.*; see also CIBINIC & NASH, *supra* note 113, at 279-79.

<sup>315</sup> FASA, Pub. L. No. 103-355, § 4301; 41 U.S.C. § 428(c).

<sup>316</sup> FAR 13.202(a)(3).

<sup>317</sup> See *supra* Part IV.B.3.

prices.<sup>318</sup> The Comptroller General confirmed this interpretation in *Naristar Marine Instrument Corp.*,<sup>319</sup> noting that agencies are normally not required to verify price reasonableness in micro-purchase transactions.<sup>320</sup>

Thus, unless the cardholder has reason to believe that a price is *unreasonable*, the cardholder may *assume* the price to be reasonable and proceed with the expenditure of taxpayer funds. At this point, then, over \$10 billion of taxpayer funds may be spent on an assumption—insulated from public scrutiny—that a vendor's price is reasonable. Moreover, such decisions are not made by trained procurement personnel, but by program office other government employees who may be more interested in obtaining a certain product rather than ensuring the government obtains

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<sup>318</sup> FAR 13.202(a)(3) (emphasis added) (“The administrative cost of verifying the reasonableness of the price for purchases may more than offset potential savings from detecting instances of overpricing. Therefore, action to verify price reasonableness need only be taken if--(i) The contracting officer or individual appointed in accordance with 1.603-3(b) suspects or has information to indicate that the price may not be reasonable (e.g., comparison to the previous price paid or personal knowledge of the supply or service); or (ii) Purchasing a supply or service for which no comparable pricing information is readily available (e.g., a supply or service that is not the same as, or is not similar to, other supplies or services that have recently been purchased on a competitive basis)”).

<sup>319</sup> Comp. Gen. B-278075, Dec. 19, 1997, 97-2 CPD ¶ 168.

<sup>320</sup> *Id.* The protester asserted that because the estimated price of the acquisition, \$3,200, was over the micro-purchase threshold, the Navy's use of micro-purchase procedures unfairly denied it an opportunity to compete for award of the contract. GAO rejected the protester's approach to determining whether the acquisition was a proper micro-purchase (i.e., use of estimated price). GAO noted that there is no statutory or regulatory guidance on which value, estimated or actual, is to be used to determine whether an acquisition properly qualifies as a micro-purchase and held that the Navy's award of the contract at a value (\$1,180) under the micro-purchase threshold qualified the contract as a valid micro-purchase acquisition. *Id.* n.1.

a reasonable price. Granted, the gravity of such an error is small when only a single purchase is considered. However, compounding such transgressions by millions of occurrences significantly increases the harm occasioned through such purchasing behavior. Unfortunately, the purchase card program's competition exemption instills little confidence in either the Government's ability to consistently obtain favorable pricing or the vigilance of those government officials entrusted with spending taxpayers' funds.

The competition exemption raises concerns regarding Government compliance with *any* existing requirements below the micro-purchase threshold. The laissez-faire purchase card regulatory approach appears ill suited to ensure compliance with the plethora of procurement regulations that Congress did not waive for micro-purchases. For example, Congress mandated that purchasers equitably distribute micro-purchases among qualified suppliers.<sup>321</sup> It is safe to assume that the lion's share of government purchasers ignore this mandate.<sup>322</sup> When an agency identifies and routinely consumes a product that meets its needs, nothing dissuades the Government from repeatedly purchasing—and common sense encourages the Government to purchase—its requirements from such a preferred supplier. While such action may prove contrary to federal law and Congressional intent, competitors lack access to government information that would allow them to detect these

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<sup>321</sup> 41 U.S.C. § 428(d); see discussion *supra* Part IV.C.3.

<sup>322</sup> Indeed, this may be one of the reasons that the Government does not *report* more detailed data regarding purchase use.

practices, just as they lack avenues to challenge such improper government purchases.<sup>323</sup> Also, weak agency surveillance fails to detect such practices. Given the scarcity of data available relating to purchase card use, improper purchases proliferate immune from public scrutiny.<sup>324</sup>

Moreover, economies enjoyed under the “old” system may be lost through increased use of the micro-purchase authority. Many commonly used supplies (e.g., office supplies) that the Government formerly purchased in large quantities at wholesale prices through hotly contested competitive procurements are now purchased in small lots on the commercial market at retail prices. The Senate Armed Service Committee recently expressed this concern and cautioned DoD to “not inadvertently encourage cardholders to purchase items at retail prices when they could be obtained at wholesale prices.”<sup>325</sup> This shift to retail purchasing may represent a significant loss of the Government’s economic leverage through aggregation of requirements. While there may exist logical reasons rebutting such conclusions, the lack of transparency in the purchase card program forestalls any such meaningful inquiry or analysis. The Government<sup>326</sup> seems uninterested in public study and analysis of any dollar premiums paid by the taxpayer for the shift from large lot wholesale purchasing to small quantity retail purchasing.

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<sup>323</sup> See *infra* notes 284-288 and accompanying text.

<sup>324</sup> See discussion *infra* Part VI.C.1.

<sup>325</sup> S. REP. NO. 106-50, at 338 (1999).

<sup>326</sup> I.e., GSA.

## D. Interest

The Prompt Payment Act<sup>327</sup> applies to micro-purchases and the purchase card program.<sup>328</sup> When purchase card statements are not paid within thirty days of the statement date, the government is liable for interest at the treasury rate.<sup>329</sup> At the end of the IMPAC program, the Department of Defense was \$8 million delinquent in purchase card payments.<sup>330</sup> Under the SmartPay contract, accounts not paid within sixty days may be suspended.<sup>331</sup> GSA has not released Government-wide data on interest payments made because of delinquencies in reconciling purchase card account statements. The Navy, however, recently paid \$323,000 in such interest in one quarter.<sup>332</sup> In February 2000, the Navy's purchase card delinquency rate surged over seven percent, well above DoD's 0.75 percent goal.<sup>333</sup> Thus, while the purchase

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<sup>327</sup> 31 U.S.C. § 3901 *et seq.*

<sup>328</sup> SmartPay Contract, *supra* note 91, at 221; *see also* FAR 52.232-17 (interest contract clause).

<sup>329</sup> SmartPay Contract, *supra* note 91, at 221.

<sup>330</sup> Memorandum from Eleanor Spector, Director of Defense Procurement, to Secretaries of the Military Departments, *Purchase Card Task Order Transition and Payment Delinquencies* (Sept. 24, 1998) <<http://purchasercard.sarda.army.mil/DOC5.htm>>.

<sup>331</sup> SmartPay Contract, *supra* note 91, at 163. DoD requires suspension of all accounts not paid within sixty days. Memorandum from Bruce E. Sullivan, DoD Purchase Card Program Manager, to Military Departments, *Purchase Card Delinquency Policies* (Sept. 17, 1999) <[http://purchasercard.sarda.army.mil/del\\_pol.htm](http://purchasercard.sarda.army.mil/del_pol.htm)>.

<sup>332</sup> Michelle Burk, *An Analysis of Purchase Card Reconciliation Times v* (1999) (Master's thesis, Naval Postgraduate School) (on file at the Defense Technical Information Center, Accession Number ADA374030 <<http://stinet.dtic.mil>>).

card program solved prompt payment problems with other government contractors, it seems to have simply shifted the problem to purchase card vendors.

#### E. Effect on Small Businesses and Other Social Policies

In FY 99, the Government awarded small businesses 4,932,296 contracting actions for a value of \$43 billion.<sup>334</sup> GSA's Federal Procurement Data Center reports a small business award rate of 23.14 percent (just above the Government's 23 percent small business contracting goal).<sup>335</sup>

The bulk of purchase card transactions are made from large businesses.<sup>336</sup> For example, office products are routinely purchased at large office super stores, such as Staples or Office Depot, and computer products are routinely purchased at

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<sup>333</sup> DoD Purchase Card Briefing at the GSA Purchase Card Expo, Slide 16 (May 2000) <<http://purchasecard.sarda.army.mil/GSAExpo.ppt>>; Memorandum from Bruce E. Sullivan, DoD Purchase Card Program Manager, to Military Departments, *Purchase Card Delinquency Policies* (Sept. 17, 1999) <[http://purchasecard.sarda.army.mil/del\\_pol.htm](http://purchasecard.sarda.army.mil/del_pol.htm)>.

<sup>334</sup> GSA FEDERAL PROCUREMENT DATA CENTER, FY 99 FEDERAL PROCUREMENT REPORT viii (2000).

<sup>335</sup> GSA FEDERAL PROCUREMENT DATA CENTER, FY 99 FEDERAL PROCUREMENT REPORT viii (2000). Interestingly, GSA bottom line figure on federal procurement goaling achievements (total federal procurement=\$185 billion) do not match the bottom line figure from the total federal view portion of the report (total federal procurement=\$198 billion). *Id.* at viii, 2. Neither figure includes the \$10 billion spent with the government purchase card. GSA FEDERAL PROCUREMENT DATA CENTER, FY 99 FEDERAL PROCUREMENT REPORT 13 (2000).

<sup>336</sup> Yabut, *supra* note 137, at 41, 52 (finding 64 percent of purchase card transactions made from large businesses in a random sample of 100 transactions).

CompUSA or other large retail stores.<sup>337</sup> Indeed, as discussed above, one of the flaws with the current SmartPay program is that the public funds expended with the purchase card are not *tracked and publicly reported* on an aggregate level, which prevents a fair analysis of this issue. If purchase card transaction data were fully incorporated into the annual Federal Procurement Report, the government would fall short of its goal of awarding twenty-three percent of all federal contracting dollars to small businesses.<sup>338</sup>

The Government utilizes its extensive purchasing power to promote numerous social policies. For good or for ill, and with mixed levels of success, federal procurement policies long have assisted disadvantaged businesses,<sup>339</sup> attempted to battle regional unemployment,<sup>340</sup> sought to ensure fair pay and benefits to workers,<sup>341</sup>

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<sup>337</sup> For FY 98, GSA has published the top ten categories of items purchased with the purchase card. Office supplies ranked sixth; computer supplies and services, when combined, ranks third. GSA SmartPay website (visited July 17, 2000) <<http://www.fss.gsa.gov/services/gsa-smartpay/impacweb.doc>>.

<sup>338</sup> See *supra* text accompanying notes 272-273.

<sup>339</sup> For example, for many years, the Government has funneled more than twenty percent of the Federal procurement budget (more than \$40 billion) to small business by reserving certain contracts for small business concerns. FAR 19.502-2(a), (b); see also GSA FEDERAL PROCUREMENT DATA CENTER, FY 99 FEDERAL PROCUREMENT REPORT viii (2000); Steven L. Schooner, Mixed Messages: *Heightened Complexity in Social Policies Favouring Small Business Interests*, 8 PUB. PROC. L. REV. CS78, CS79 (1999). Despite significant objection, the Government recently raised its small business goal to twenty-three percent of the Federal procurement budget. Small Business Reauthorization Act of 1997, Pub. L. No. 105-35, § 603(b), 111 Stat. 2592, 2631-32, 15 U.S.C. § 644(g)(1).

<sup>340</sup> FAR Subpart 19.3— Determination of Status as a Small Business, HUBZone Small Business, or Small Disadvantaged Business Concern; FAR Subpart 19.13— Historically Underutilized Business Zone (HUBZone) Program.

and provided preferences for special sources of supply, such as the blind and the severely disabled.<sup>342</sup> Statutes such as the Buy American Act<sup>343</sup> and the Trade Agreements Act<sup>344</sup> favor products manufactured in the United States or in countries with open trading regimes. Further, during the 1990s, procurement regulations began to favor environmentally friendly products, such as recycled paper, re-refined motor oil, and most recently, bio-based products.<sup>345</sup>

Any serious consideration of the purchase card must acknowledge that, to proponents in program offices, one of the purchase card program's most attractive features is a *de facto* insulation from these federal social policies. The impact of the broad policy exceptions resulting from the confluence of the charge card and the

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<sup>341</sup> Davis-Bacon Act, 40 U.S.C. § 276a, FAR Subpart 22.4; Service Contract Act, 41 U.S.C. §§ 351-357, FAR Part 37 & Subpart 22.10; Walsh Healy Public Contracts Act, 41 U.S.C. §§ 35-45, FAR Subpart 22.6.

<sup>342</sup> See *supra* Part IV.C.1.

<sup>343</sup> 41 U.S.C. § 10a-10d; FAR Subparts 25.1 & 25.2—Buy American Act.

<sup>344</sup> 19 U.S.C. § 2501-2582; FAR Subpart 25.4—Trade Agreements.

<sup>345</sup> Exec. Order No. 13,101, Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition, 63 Fed. Reg. 49,643, 49,644 (1998) (“‘Biobased product’ means a commercial or industrial product (other than food or feed) that utilizes biological products or renewable domestic agricultural (plant, animal, and marine) or forestry materials”); Exec. Order 12,873, Federal Acquisition, Recycling, and Waste Prevention, 58 Fed. Reg. 54,911 (1993); FAR 23.4—Use of Recovered Materials. “The Government’s policy is to acquire, in a cost-effective manner, items composed of the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition without adversely affecting performance requirements or exposing suppliers’ employees to undue hazards from the recovered materials.” FAR 23.403. See Jennifer McCadney, *The Green Society?*

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micro-purchase authority constitutes a significant exception to the social goals normally mandated in government procurement.

At times, this panoply of social policies increases the prices the Government must pay and often adds to the time and the administrative burdens associated with purchasing. The nature of the democratic process ensures never-ending debate surrounding the validity, or more cynically, the popularity, of such individual social policies injected into the federal procurement process. For more than twenty million smaller buys (two-thirds of the Government's contracting actions), however, government buyers need not, *as a practical matter*, contend with the intricacies of individual social programs. Most purchase card users, buying below the micro-purchase card threshold, lack the knowledge or the incentive to comply with *any* of these programs. Congress may not have intended, nor appreciated the reality of, such a laissez-faire approach amongst buyers in creating the waivers associated with the micro-purchase threshold.

Furthermore, the confluence of the purchase card and the micro-purchase threshold implicitly encourages cardholders to split requirements to stay within the micro-purchase limit. This practice is commonly referred to as "unbundling."<sup>346</sup>

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*Leveraging the Government's Buying Powers to Create Markets for Recycled Products*, 29 PUB. CONT. L. J. 135 (1999).

<sup>346</sup> Bundling is the practice of combining smaller purchases to leverage the Government's superior buying power to obtain the benefits of economies of scale or to reduce administrative costs. The term typically connotes a consolidation that denies small businesses a fair opportunity to compete for award of the contract. NASH, SCHOONER & O'BRIEN, *supra* note 90, at 72; see also Steven L. Schooner, (continued ... )

Whether faced with the task of furnishing an office or purchasing a personal computer, printer, and peripherals, the buyer's task is simplified and expedited by purchasing components separately in units under \$2,500. By unbundling larger buys, the end user maintains control over the selection of retailer and product brand name, eschews competition and related administrative hassles, and, of course, avoids potentially confusing or meddlesome small and disadvantaged business preferences, domestic preference policies, and other social requirements.

Granted, splitting requirements with the intent to avoid the purchase limitation is improper, and regulatory language discourages such practices.<sup>347</sup> Conversely, a host of forces cultivate, and even encourage, unbundling behavior, including: (1) the Government's unequivocal encouragement of the broadest possible use of the purchase card;<sup>348</sup> (2) a lack of training amongst card users (to be clear, lacking

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Mixed Messages: *Heightened Complexity in Social Policies Favouring Small Business Interests*, 8 PUB. PROC. L. REV. CS78, CS81 (1999); FAR 2.101. Unbundling is just the opposite—splitting a larger purchase into several smaller purchases to avoid, among other things, the small business reservation for all purchases between \$2,500 and \$100,000. See FAR 13.003(c)(2).

<sup>347</sup> FAR 13.003(d); U.S. Army Space and Missile Defense Command, *Commercial Credit Card Program ¶ 7.b(1)* (visited July 17, 2000) <<http://www.smdc.army.mil/Contracts/CreditCard/Pamphlet.html>>; U.S. Army Materiel Command, Government Purchase Cardholder And Billing Official Training, Module 3 (last updated Mar. 30, 2000) <<http://www.amc.army.mil/amc/rda/rda-ap/impactut.html>>; Defense Service Supply-Washington Purchase Card Training Handout 5 (1999) (on file with author); see also 41 U.S.C. § 427(b).

<sup>348</sup> FAR 13.201(b); see also 64 Fed. Reg. 38,878 (1999) (DoD proposed rule to require use of the purchase card for micro-purchases unless a specified exception is authorized.)

meaningful procurement education, most purchase card users are unaware of what statutory policies are foiled by unbundling);<sup>349</sup> (3) limited oversight, statistical monitoring, or controls on the purchase card program, which generate ineffective means to detect, let alone prevent, abuses;<sup>350</sup> and, of course, (4) the lack of transparency in the purchase card program.<sup>351</sup>

The lack of publicly available meaningful purchase card transaction data precludes investigation into the extent of these concerns. These problems are exacerbated by the fact that the majority of purchase card use is by end users in program offices (i.e., not procurement professionals trained in the complexities of federal procurement law and policy and not even commodity experts on the products they are purchasing). Consequently, the explosion in purchase card use comes at the expense of long-standing governmental policies favoring, among others, small and disadvantaged businesses, women-owned businesses, and the blind or severely disabled.

With the breadth of this broad policy exception growing significantly every year,<sup>352</sup> the time has come to examine the impact of the purchase card program on

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<sup>349</sup> See *supra* text accompanying notes 198-205.

<sup>350</sup> Cf. Michael F. Mason, *Bid Protests and the U.S. District Courts—Why Congress Should Not Allow the Sun to Set on This Effective Relationship* 26 PUB. CONT. L.J. 567, 569 (1997) (arguing for maintenance of a robust protest system to ensure competition); *Small Business: DoD's Hope of Raising Micropurchase Ceiling to \$10,000 Appears Doomed in Congress*, 69 Fed. Cont. Rep. (BNA) 611 (June 1, 1998).

<sup>351</sup> See discussion *supra* Part VI.C.1.

<sup>352</sup> See discussion *supra* Part II.F.

these social policies. Such study, analysis, and debate require, *a priori*, full integration of purchase card transaction data into the annual Federal Procurement Report.<sup>353</sup> Only then can a full and fair study, analysis, and debate begin.

## VII. CONCLUSION: CONGRESS SHOULD REQUIRE FULL INCLUSION OF PURCHASE CARD DATA IN THE FPDS

The government purchase card offered hope for, and promptly delivered results in, streamlining the Government's high volume of low dollar acquisitions. Purchase card use skyrocketed throughout the 1990s, resulting in significant administrative savings, particularly in terms of the procurement workforce's labor and time. The Government quickly chronicled these achievements. As the program evolved into established practice, however, the Government has been slow to devote resources to studying the policies impacted by and, if necessary, managing the risks associated with, widespread use of the government purchase card.

At the very least, Congress—or, in the Executive Branch, the Office of Federal Procurement Policy<sup>354</sup>—should: (1) acknowledge that purchase card transactions constitute a significant portion of the procurement budget and (2) promptly mandate a timetable for GSA to fully integrate purchase card transactions into the data collected and disseminated through the FPDS. The Government's reticence to do so is disingenuous. As card vendors routinely prove, and as the proliferation of point-of-sale inventory systems demonstrates, current technology offers powerful tools to

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<sup>353</sup> See discussion *supra* Part VI.C.1.

achieve these, and other, data collection and management ends.<sup>355</sup> Indeed, the SmartPay contract requires vendors to submit detailed transaction data, including procurement preferences goaling data, to the Government in electronic format.

This small step—treating relevant data on purchase card transactions similarly to other small procurements—would allow meaningful review of the purchase card program to ensure that it is furthering the Government’s laws, programs, policies, and goals. With the current unavailability of publicly-available purchase card statistical data, the cost of the purchase card program—in terms of both dollars and impact on policy goals—remains unknown to those who foot the bill—the American taxpayers.

The cardholder is the most important player in the GSA SmartPay program<sup>356</sup> and unfortunately, is the least trained in the complexity of government procurement. Agencies must invest additional resources needed to provide more substantial training for employees armed with the purchase card. Agencies must also commit to periodic refresher training to remind cardholders of their responsibilities and make

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<sup>354</sup> OFPP is responsible for providing overall executive branch guidance and direction of Government procurement policy. *See generally* 41 U.S.C. §§ 404-405.

<sup>355</sup> See, e.g., Federal Government Smart Card website (visited July 17, 2000) <<http://smart.gov>>; VISA Smart Card Technology Solutions (visited July 17, 2000) <<http://www-s2.visa.com/pd/govt/smart.html>>; Smart Card Industry Association website (visited July 17, 2000) <<http://www.scia.org>>.

<sup>356</sup> GSA Federal Supply Service Briefing, Managing Your Card Program, Slide 11 (visited July 23, 2000) <<http://www.fss.gsa.gov/services/gsa-smartpay/expo2web.ppt>>.

them aware of developments in the law, procurement regulations, and policies that impact the purchase card procurement process. At the same time, agencies should share lessons learned on effective purchase card oversight; if necessary, the Office of Federal Procurement Policy could facilitate such an effort. In sharing experiences, agencies must recognize that both success stories and failures permit other agencies to accelerate their experiential learning curves. Proposals to increase the micro-purchase threshold should be tabled until purchase card transaction data is fully incorporated into the FPDS.

Other than with regard to broad notions of administrative efficiency, the public interest remains conspicuously absent from the Government's discussion of the purchase card program. While the purchase card certainly has reduced the administrative burdens associated with small government purchases, it may be premature to declare the card a panacea, or its implementation a success. Possibly, it has become too easy for government employees to spend taxpayer funds. At the same time, without meaningful purchase transaction data, it is premature to declare the purchase card a case of acquisition reform gone too far. The public interest demands consideration, review, and analysis of the amount of control, or lack thereof, over the purchase card program. The public interest likewise demands that GSA fully incorporate purchase card transaction data into the annual Federal Procurement Report. Only then can policymakers and the public alike make a meaningful review and analysis of the purchase card program on a government-wide basis. Absent such action, the only rational conclusion is that the President and the

Congress have willingly sacrificed fundamental procurement policies in the name of administrative efficiency.